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OFFICIAL OPINIONS

OF

PERCY V. LONG

CITY ATTORNEY

OF THE

City and County of San Francisco

STATE OF CALIFORNIA



PUBLISHED BY

THE CITY AND COUNTY OF SAN FRANCISCO

JANUARY 1913



NOTE

This volume contains a record of opinions which issued from the City Attorney's Office between January 3, 1910, and July 1, 1912. There will be found, in addition to a full index, a list of citations to the Charter, the Constitution, State Statutes, Codes, and ordinances, orders and resolutions of the Board of Supervisors.



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OFFICIAL OPINIONS

Advising as to Validity of Liquor Ordinance Passed by Vote of the People.

January 3rd, 1910.

Gentlemen: My attention has been called to Resolution No. 5067 (N. S.) requesting me to advise you whether the so-called Liquor Ordinance adopted in accordance with Section 20, Chapter I, Article II of the Charter, by a vote of the people at the last election "is in conflict in any or all of its provisions with the Charter of the City and County of San Francisco."

The first section of the ordinance fixes the amount of the license of a Retail Liquor Dealer at \$500. The other provisions relate to the procedure to be followed when an application is made for a permit to engage in a retail liquor business prescribe the qualifications that must be possessed by a person engaging in that business and lay down generally the rules that shall govern the granting of all retail liquor licenses and the revocation of such licenses.

It is clear that so far as section 1 is concerned it is not in conflict with any provision of the Charter. The amount of the license required of a retail liquor dealer has always been fixed by ordinance of the Board of Supervisors.

The adoption by the people of an ordinance fixing the amount of such a license has the same force and effect as the adoption by the Board of Supervisors of a similar ordinance. Therefore, even though there were other provisions of the ordinance which are in conflict with the Charter or which, for some cause or other were unconstitutional, Section 1 of the ordinance would still stand and would be enforceable.

It is of course fundamental that the Charter cannot be amended by an ordinance adopted either by the Board of

Supervisors or by the people. The Constitution has laid down the procedure by which the Charter may be amended and that procedure is exclusive. If there is any provision by the ordinance which attempts to or does in effect modify or change any of the provisions of the Charter of the City and County of San Francisco that provision of the ordinance would necessarily be unconstitutional and unenforceable.

It has been my practice never to declare an ordinance regularly adopted to be unconstitutional except in a very plain case. It is not so apparent to me that the provisions of the ordinance in question are unconstitutional or are in conflict with any provisions of the Charter as would justify me in declaring any part of the ordinance in question violative of the provisions of the Charter or unconstitutional. Whether the ordinance is unconstitutional is for the courts to pass upon and the proper way to test the ordinance would be through some properly instituted action brought for that purpose. In that way the matter could be finally determined.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Police Commissioners May Detail Special Officer
in Chinatown.**

January 6th, 1910.

Dear Sir: I am in receipt of your request for an opinion as to whether the so-called McCoppin Act found in the Statutes of 1877-1878, which provides that no special officer shall be appointed in the Chinese quarter of the City and County of San Francisco by the Board of Police Commissioners, applies at the present time.

I am of the opinion that the statute in question was superseded by the Charter and that the Board of Police Com-

missioners created by the Charter has full control and power in the matter of the appointment of special officers.

Respectfully,

PERCY V. LONG,
City Attorney.

Jesse B. Cook,
Chief of Police.

Change in Street Names Does Not Affect Contracts for Street Work Made Prior to Change of Name.

January 7th, 1910.

Gentlemen: I am in receipt of your communication of December 20, 1909, as follows:

“I am directed by the Committee on Changing of Names of Streets of the Board of Supervisors to request you to advise said Board whether or not the change in street names recently made by the Supervisors will affect the validity of public or private contracts, wherein the old name of the street appears instead of the new name.”

A resolution of intention for the doing of street work on any public street in this city and county adopted by the Board of Public Works and published and mailed in accordance with the provisions of the Charter pertaining thereto is designed for the purpose of informing owners of property on the street proposed to be improved of such proposed improvements.

The Supreme Court of the State of California in the case of Chase v. Trout, 146 Cal. page 368, in passing upon this point, used the following language:

“The purpose to be served by the publication of the resolution (of intention) is, in the first place to inform interested persons of the general character of the improvements proposed and in the second place to make a specific declaration

of the particular kind of improvements as a basis for future action."

Owners of property fronting on a public street are notified by the publication of a resolution of intention of the contemplated work so that they may have an opportunity to protest against the doing of the same and a resolution of intention adopted by the Board of Public Works designating a certain street by name, published in due form, gives property owners thereon notice of the proposed improvements and the right to protest thereto and the rights of property owners are not taken away nor interfered with by an ordinance subsequently passed by the Board of Supervisors changing the name of the street on which it is proposed to perform the work; such an ordinance does not change the character of the work to be done nor change the location of the street nor in any manner alter or modify the matters or things expressed in the resolution of intention except the name of the street whereon the proposed work is to be done, and such change of name does not invalidate the proceedings taken under a resolution of intention and does not render it necessary to institute proceedings anew.

You are therefore advised that the work can be continued under said proceedings, using both the old and new names in future resolutions.

Respectfully,

PERCY V. LONG,

City Attorney.

Committee on Changing of Names of Streets,
Board of Supervisors.

**Change of Street Names Does Not Affect Contracts for
Street Work Made Prior to Change of Names**

January 7th, 1910.

Mr. Marsden Manson,
City Engineer,
David Hewes Building,
San Francisco, California.

Dear Sir: I am in receipt of your communication of December 24, 1909, as follows:

"Since the passage of Ordinances Nos. 988 and 989 by the Board of Supervisors on December 8, 1909, changing the names of many streets in this city, the question has arisen as to whether it will be necessary for the Board of Public Works to start proceedings anew for street work to be performed under public contract which had already been declared expedient or the proceedings for which had reached various stages required under the provisions of the Charter prior to the above date, or whether the law would be complied with by continuing the proceedings, using both the old and new names in future resolutions."

A resolution of intention for the doing of street work on any public street in this City and County, adopted by the Board of Public Works and published and mailed in accordance with the provisions of the Charter pertaining thereto, is designed for the purpose of informing owners of property on the street proposed to be improved of such proposed improvements.

The Supreme Court of the State of California in the case of Chase v. Trout, 146 Cal., page 368, in passing upon this point, used the following language:

"The purpose to be served by the publication of the resolution (of intention) is, in the first place to inform interested persons of the general character of the improvements proposed and in the second place to make a specific declaration of the particular kind of improvements as a basis of future action."

Owners of property fronting on a public street are notified by the publication of a resolution of intention of the contemplated work so that they may have an opportunity to protest against the doing of the same and a resolution of intention adopted by the Board of Public Works designating a certain street by name, published in due form, gives property owners thereon notice of the proposed improvements and the right to protest thereto and the rights of property owners are not taken away nor interfered with by an ordinance subsequently passed by the Board of Supervisors changing the name of the street on which it is proposed to perform the work; such an ordinance does not change the character of the work to be done nor change the location of the street nor in any manner alter or modify the matters or things expressed in the resolution of intention except the name of the street whereon the proposed work is to be done and such change of name does not invalidate the proceedings taken under a resolution of intention and does not render it necessary to institute proceedings anew.

You are therefore advised that the work can be continued under said proceedings, using both the old and new names in future resolutions.

Respectfully,

PERCY V. LONG,
City Attorney.

**Money Collected for Salaries of Firemen Doing Theatre Duty
Must Be Deposited with County Treasurer.**

January 13th, 1910.

Gentlemen: You ask to be advised as to what course your Board should pursue regarding the collection of salaries of the members of your Department detailed for special fire duty at theaters and other places of amusement as required by Section 185 of the Building Law.

Under the provisions of the Charter all moneys collected for the use of the City and County coming into the hands of

any officer of the City and County must be immediately deposited with the Treasurer.

You are accordingly advised that all moneys collected under your direction and in accordance with this Section of the Building Law should be immediately turned over to the Treasurer.

The salaries of the members of the Department acting upon such details are to be paid in accordance with the provisions of Chapter IV of Article III of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Advising as to Charter Sections which Govern when Additional Force is Needed.

January 13th, 1910.

Gentlemen: Under date of January 7th, 1910, you asked to be advised whether your Board has the power to create and establish such fire companies as it may deem necessary from time to time and make the necessary appointments thereto in accordance with Section 5 of Chapter I of Article IX of the Charter, or whether the provisions of Section 35 of Article XVI of the Charter control.

Section 5 of Chapter I of Article IX of the Charter reads as follows:

“The Board shall organize the Department, create and establish such fire companies as it may deem necessary, prescribe the number and duties of the officers, members and employees of the Department, and the uniforms and badges to be worn by them; have control of all the property and equipments of the Department, and exercise full power and authority over all appropriations made for the use of the Department.”

Section 35 of Article XVI of the Charter reads as follows:

“When any officer, board or department shall require additional deputies, clerks or employees, application shall be made to the Mayor therefor, and upon such application the Mayor shall make investigation as to the necessity for such additional assistance; and if he find the same necessary he may recommend to the Supervisors to authorize the appointment of such additional deputies, clerks or employees; and thereupon the Supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointments and provide for the compensation of such appointees, subject to the limitations contained in this Charter and subject to the provisions of Article XIII thereof.”

The latter section clearly applies to conditions when an officer, board or department, the number of whose deputies, clerks or employees is specified in the Charter, requires additional places to be created and no other authorization for the creation of additional places is made.

The provisions regarding the powers of the Board of Fire Commissioners are broad enough and clear enough to authorize your Board to “create and establish such fire companies as it may deem necessary and prescribe the number and duties of the officers, members and employees” within the appropriation of the department.

You are therefore advised that your Board is to be governed by the provisions of Section 5 of Chapter I of Article IX of the Charter when additional fire companies and officers are deemed necessary.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Deputy Tax-Collector Entitled to Salary During Illness.

January 19th, 1910.

Dear Sir: I am in receipt of your communication of January 18th which reads as follows:

"During the month of July, 1909, W. T. Howe, a regular deputy of this office, was absent from duty on account of severe sickness. Because of said absence I did not issue salary demand in favor of Mr. Howe for the month of July. Howe now claims that inasmuch as the Charter provides for an annual salary of \$1500 to be paid him as deputy Tax Collector, he is entitled to collect his salary for July and that I am required to and justified in executing a demand on the Treasurer in his favor for proportion of his annual salary for the month of July."

In reply thereto you are advised that the salary of a Deputy Tax Collector is fixed by the Charter at Fifteen Hundred (\$1500) Dollars per year. The payment of this salary in monthly installments is for the convenience of all concerned and does not in any way affect the right of tenure. Such being the case a deputy is entitled to the salary for the entire year unless suspended or removed in accordance with the provisions of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Heirs of Police Officer Who Commits Suicide, Not Entitled to Pension Benefits.

January 19th, 1910.

Gentlemen: I am in receipt of a communication of the 5th inst., as follows:

"I have been instructed by the Board of Police Pension

Fund Commissioners to submit the following question for your opinion—

‘Are the heirs of a Police Officer who commits suicide entitled to the relief granted under the provisions of Section 6, Chapter 10, of Article VIII of the Charter?’ ”

Article VIII, Chapter X, Section 6 of the Charter reads as follows:

“When any member of the Department shall, after ten years’ service, *die from natural causes*, then his widow, and if there be no widow, then his children, or if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to a sum equal to the amount retained by the Treasurer from the pay of such deceased member and paid into the Relief and Pension Fund; but the provisions of this section shall not apply to any member of the Department who shall have received any pension under the terms of this Chapter.”

Your inquiry has been answered by the Supreme Court of California in the case of Slevin vs. Police Fund Commissioners, 123 Cal., 130. In that case the construction of Section 7 of an Act of the Legislature passed March 4, 1889, was at issue. Patrick Slevin died on the 6th day of March 1895, and his death was the result of injuries received in a railroad accident two days previous thereto. Section 7 of the afore-said Act under which claim was in that case made, reads as follows:

“Whenever any such member of the police department of such county, city and county, city or town shall, after ten years of service, *die from natural causes*, then his widow or children, or, if there be no widow or children, then his mother or unmarried sisters, shall be entitled to the sum of one thousand dollars from such fund.”

The Court at pages 131 and 132 said:

“It is contended that Slevin did not die from natural

causes, and therefore, under the terms of the act, his widow is not entitled to the insurance.

What is meant from the phrase "shall die from natural causes." It is not an uncommon colloquial expression, and I think uniformly means that the person who died from natural causes was not killed. To say that one died from natural causes is to say that he was not killed; that is, he did not die through external violence or through human agency. I do not think any persons who are proficient in the use of the English language would understand the expression differently. If in response to the question: "Was he killed," the reply was, "He died from natural causes," we would be at no loss for the meaning of the reply. So if the statement were made in a military report that a certain number died from natural causes, the meaning would be clear. Nor are we without authority. In Bouvier's Dictionary, Rowles' Revision, verb "death" it is said: "Natural death is the cessation of life. It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from violent death, one caused or accelerated by the interference of human agency." Black's Law Dictionary, phrase "Natural Death:" "Death resulting from disease, or from natural forces, without the concurrence of man's agency, as distinguished from violent death." See also Webster's Dictionary, verb "Natural".

But it said that the usual and ordinary meaning of the words leads to absurd results and the limitation is unreasonable. I confess it is difficult to understand why this particular limitation was imposed, but to give the language its ordinary meaning does not lead to absurd results, and I do not see how, without doing violence to the language, any other meaning than that well established by usage can be given it.

* * * * *

Nor can it be held to provide against the case of suicide. There is nothing in the law to indicate such intention and it is absurd to say that one who dies from wounds inflicted by an assassin dies from natural causes, while if the same fatal

injuries had been inflicted by himself his death would not have resulted from natural causes.”

I therefore advise you that in the light of this decision of the Supreme Court construing language of a statute identical with that of our Charter section, that the heirs of a police officer who commits suicide are not entitled to the relief granted under the provisions of Section 6, Chapter X, Article VIII of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Pension Fund Commissioners.

Advising as to Status of Case of Brown vs. Bush, and Interpreting Nickel-in-the-Slot License Ordinances.

January 20th, 1910.

Dear Sir: I am in receipt of your communication of the 7th inst., in which you make inquiry as follows:

First: What is the effect of the decision of Judge Sturtevant in the case of Abraham Brown vs. David Bush etc., as to the nullifying of Ordinances Nos. 401 and 777, or either of them?

Second: You state that you have held that a “collection of machines” contained in a room to which no admission is charged, operated through the depositing of a coin by the patrons or visitors must be paid for as individual machines under Section 1 of Ordinance No. 765 at \$2.00 each per quarter, and not under Section 4 of Ordinance No. 777 at \$25.00 per quarter for the “collection”, and you request advice as to whether you are correct in your construction of these Ordinances.

Opinion.

First: Judge Sturtevant in the case of Abraham Brown vs. David Bush etc., No. 20,817, decided, on February 27,

1909, that Ordinance No. 627 which repealed Ordinance No. 401 and which adds a new section 4-a to Ordinance No. 777, requiring the obtaining of a permit from the Police Commissioners by those conducting kinetoscope parlors, etc., was unconstitutional. The decision, of course, affected only that particular section 4-a of Ordinance No. 777. This office subsequently filed an appeal from this decision to the District Court of Appeal of this State, but thereafter the Board of Supervisors passed an Ordinance No. 761 which is their latest consideration on the subject of kinetoscope parlors, and inasmuch as the appeal in the Brown case would therefore have been a moot subject, and would doubtless not have been considered by the District Court of Appeal, we have not pressed this appeal. That is, Ordinance No. 761, in effect repealed so much of Ordinance No. 777 as was before the Court for its consideration in the Brown case.

If this latest Ordinance No. 761, should at any time be passed upon by the Courts the record would then be in such a condition that it might be taken up on appeal. In the meantime Ordinance No. 777 as amended by Ordinance No. 627 should be observed by your office, keeping in mind the latest Ordinance No. 761, which covers moving picture machines.

Second: Ordinance No. 777, Section 4, reads as follows:

“Section 4. Every person, firm or corporation maintaining or conducting any museum, panorama or cyclorama where an admission fee is charged, or any kinetoscope or phonograph parlor, or any collection of machines operated for the entertainment or amusement of the public, shall pay a license of twenty-five (25) dollars per quarter.”

Section 1 of Ordinance No. 765, reads as follows:

“Section 1. Every person, firm or corporation owning or having control of any weighing machine, phonographic machine, fortune-telling machine, punching machine, lifting machine, music machine, electric machine, or any other machine or apparatus of any kind, character or description, in or on which, on deposit of a five-cent piece, or any other

piece of money, or article representing money, within said machine, a person is weighed, or music is played or any other service is rendered by means of such machine, shall pay a license of two (2) dollars per quarter for each machine so used.

Both of these Ordinances were approved May 28, 1903. It therefore follows that since the City's legislative body specifically provided for certain "nickle in the slot machines" in Section 1 of Ordinance No. 765, which they did not provide for in Section 4 of Ordinance No. 777, that you are correct in applying Section 1 of Ordinance No. 765, in any case of a nickel in the slot machine such as is described in Section 1 of Ordinance No. 765.

It would seem that "any collection of machines operated for the entertainment or amusement of the public" in Section 4 of Ordinance No. 777 should be related back to "where an admission fee is charged" thus showing a clear distinction between this Section 4 of Ordinance No. 777 and Section 1 of Ordinance No. 765.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Bail Money Is Not Subject to Attachment.

January 20th, 1910.

Dear Sir: In answer to your communication of September 27th, 1909, I would respectfully call your attention to the opinion rendered to the Treasurer on August 5th, 1902, by the City Attorney as follows:

"Replying to yours of August 2nd, 1902, I am of the opinion that bail money in your hands is not subject to attachment. (Shinn on Attachment, Sec. 46; Am. and Eng. Ency. of Law, 2nd Ed. Vol. 14, p 806)" in which opinion I concur.

Bail money in your hands, therefore, not being subject to attachment or garnishment, you are advised that you may pay the same to the person named in the order of Court as being entitled thereto.

Respectfully,

PERCY V. LONG,

City Attorney.

The Treasurer.

Treasurer Cannot Transfer Moneys from any other Fund to the Water Supply Bond Fund.

January 21st, 1910.

Sir: You asked to be advised as follows:

“The Board of Supervisors, not having made sufficient provision in the last levy of 1909-10 to meet the Water Supply Bonds maturing January 1, 1910, will you kindly inform this office what authority, if any, the Treasurer has to transfer funds from other bond accounts, or any other funds to meet such a deficiency.”

Section 1 of Chapter II of Article III of the Charter provides that,—

“The income and revenue paid into the treasury shall be at once appropriated to and kept in separate funds. It shall not be lawful to transfer money from one fund to another or to use the same in payment of demands upon another fund.”

Section 2 of Chapter III of Article IV of the Charter provides that the Treasurer shall “keep the accounts belonging to each fund separate and distinct, and shall in no case pay demands chargeable against one fund out of moneys belonging to another.”

Section 12 of Article XII provides as follows:

“At the time of levying the municipal tax, and in the manner provided for such tax levy, the Supervisors shall

levy and collect annually a tax sufficient to pay the annual interest on such bonds, and also such part of the bonded municipal indebtedness as will fall due within the succeeding fiscal year, and as may be necessary to provide for the sinking fund payments of the next succeeding fiscal year; PROVIDED that when the interest and sinking fund payments for any fiscal year on the bonds issued for any public utility can be met out of the surplus earnings of such public utility for the preceding fiscal year, no tax shall be levied for such purpose. Such taxes shall be in addition to all other taxes levied for municipal purposes, and shall be collected at the same time and in the same manner as other municipal taxes are collected."

From the foregoing provisions of the Charter it is apparent that you are without authority to transfer moneys from any other fund to the Water Supply Bond Fund but that the bonds maturing, together with the interest, must be paid out of the moneys received into that particular fund.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

Advising as to Duty to Consider the Last of Two Conflicting McEnerney Action Judgments, in Determining to Whom to Assess Property, Also as to when surplus occurs in a block.

Assessments Should Be Levied upon a street if decree in favor of a plaintiff, to title in the street, is obtained. Those holding leasehold interests, and not the owners of the State's reversionary interest, should be assessed.

January 21st, 1910.

Sir: I am in receipt of your communication of January 3rd, 1910, reading as follows:

“The Assessor’s office desires the opinion of the City Attorney on the following propositions:

Where McEnerney Judgments conflict should priority of Judgment prevail?

Where a surplus in any block occurs should such surplus be assessed to the party obtaining a McEnerney Judgment for same?

Where McEnerney Judgments are obtained covering portions of streets, alleys, public parks, etc., that are platted on our block books as such should we assess them to the parties obtaining Judgments for same?

Should State Reversionary Interests in Real Estate be assessed?”

Opinion.

In answering the first question propounded in your communication, I will assume that the purpose thereof is as to the power and duty of the Assessor to assess property upon which conflicting judgments, in the matter of the description of property, have been made by the Superior Court.

The powers and duties of the Assessor were very fully considered and passed upon by the Supreme Court of this State in the case of Klumpke vs. Baker, 131 Cal., at page 82, wherein it says:

“Section 3628 of the Political Code provides that the Assessor shall assess the property ‘to the person by whom it was owned or claimed, or in whose possession or control it was at 12 o’clock M. of the first Monday in March next preceding; but no mistake in the name of the owner, or supposed owner, of real property shall render the assessment thereof invalid.’ The assessment is not against the owner, but is of the property, and that must be correctly described. The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment. In *Lake County vs. Silver Bank, etc. Min. Co.*, 66 Cal. it was said: The ascertainment of the name of the owner

is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned."

"The failure of the assessor to describe the land in accordance with the metes and bounds given in the conveyance to the person who is assessed therefor, as well as his including therein land which is owned by another person, is only 'a mistake in the name of the owner' of the lot assessed and does not render the assessment invalid

* * * * *

"The provision in subdivision 3 of Section 2650, that the assessor must specify in the assessment book, under its appropriate head, 'City and town lots, naming the city or town and the number of the lot or block, according to the system of numbering such city or town, and improvements thereon,' was followed in the present assessments. The assessor observed the provisions of this section by specifying the number of the block according to the official subdivision of the land in that portion of the city; and it does not appear that there is any 'system' in San Francisco for the subdivision of the blocks into lots. In such a case the assessor may assess any subdivisions according to their individual ownership, and his determination thereon is not open to review, and if erroneous does not invalidate the assessment."

It being, therefore, the plain duty of the Assessor to assess property to the person by whom it is owned or claimed, or in whose possession or control it was at 12 o'clock M. of the first Monday of March next preceding, it follows that the Assessor must assess property in accordance with and in respect to the last judgment of Court under the so-called McEnerney Act, and his judgment or conclusion in regard thereto is final, so far as the validity of the tax is concerned.

The above answer to your first question covers the second question also.

Under the provisions of Section 3628, cited above, making it the duty of the Assessor to assess property to the person by whom it is owned or claimed or in whose possession or control

it is at 12 o'clock M. of the first Monday in March next preceding, I advise you that it would be expedient and proper to assess the property mentioned in your third question to the persons appearing as plaintiffs and who have obtained judgments covering such property under the McEnerney Act, as such assessment does not in any manner prejudice any rights of the City and County for the reason that the assessment is not final and determinative of the ownership of the property. (Smith v. San Luis Obispo, 95 Cal. 462; San Leandro v. Le Breton, 72 Cal. 170; Schmidt v. San Francisco, 100 Cal. 302.)

Answering your fourth question, I would refer you to the opinion of the City Attorney (Opinions 1899-1902, page 698, et seq), in which I concur, given to the Assessor, dated April 29, 1902, in answer to a similar question, in which he says in conclusion, "It appears to me that the safe course for the protection of the municipality is the simple one above indicated, in which those having the ninety-nine year interest and who are in possession and have the entire beneficial interest of the estate during the year for which the assessment is made, should be named on the roll as the owners thereof."

Respectfully,

PERCY V. LONG,
City Attorney.

The Assessor.

Franchise necessary to erect poles and string wires, for the transmission of electric power.

January 21st, 1910.

Sir: I have your communication of January 15th, 1910, in which you ask to be advised as to the right of the Joint Commission in control of the Department of Electricity to grant to the Sierra and San Francisco Power Company permits to string wires or cables for the purpose of conducting electricity for power purposes over the public streets of San Francisco. You state that the Company has no franchise for this purpose but that permission was granted to erect poles therefor by

resolution of the Board of Public Works, passed November 17, 1909.

The provisions of the Charter relating to the erection and maintenance of poles and wires for conducting electric power are as follows:

Subdivision 13 of Section I of Chapter II of Article II reads as follows:

“Except as otherwise provided in this Chapter, to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the City and County, and to acquire, regulate and control any and all appliances for the sprinkling and cleaning of the streets of the City and County, and for flushing the sewers therein.”

Section 7, Chapter II of Article II provides:

“The Supervisors shall have no power to grant franchises or privileges to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway of the City and County except upon all the conditions and in the manner, including competitive bidding and payment of a percentage of gross receipts, hereinbefore set out, and upon the further condition that the Board shall at all times have the right to regulate the charges of any person, company or corporation using, enjoying or possessing such franchise or privilege.”

Subdivision 1 of Section 9 of Chapter I of Article VI provides that the Board of Public Works shall have charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors of all public ways, streets, avenues, etc., and also that the Board of Public Works shall have exclusive authority to prescribe rules and grant permits in conformity with the ordinance of the Supervisors for “the creation of telegraph and telephone poles and poles for electric lighting and the laying under the surface of the streets or sidewalks of telegraph or telephone wires and wires for electric lighting and power.”

Section 6 of Chapter 9 of Article IX provides as follows:

“The Department of Electricity is also charged with the duty of enforcing all the rules, regulations, orders and requirements made by ordinance of the Supervisors in regard to the inspection and supervision of electrical wires and appliances, and the currents for furnishing light, heat or power in and upon streets and buildings in the City and County.”

From the foregoing it is apparent that the power to regulate and control the erection and maintenance of poles and wires for the transmission of electricity for power purposes is conferred upon the Board of Supervisors. The method of granting franchises for this purpose is fully and clearly set forth in Section 7 of Chapter II of Article II, to which you are referred.

The only power given the Board of Works in this respect is to superintend and control the erection of telegraph, telephone and electric lighting poles and the laying under the surface of the streets or sidewalks of telegraph, telephone, electric lighting and power wires, such superintendence and control is always subject to the ordinances adopted by the Board of Supervisors but no ordinance can extend the power of the Board of Works to grant power for the erection or maintenance of poles for the transmission of electric power.

The only duty of the Department of Electricity in this respect is to enforce the rules, regulations, orders and requirements made by ordinance of the Supervisors. Nowhere is this Department given the power to grant permits for the erection of poles or wires.

You are accordingly advised that unless the procedure hereinbefore outlined has been followed there is no authority given the Sierra and San Francisco Power Company to erect poles mentioned or to string wires for the purpose of conducting electricity for power .

Respectfully,

PERCY V. LONG,
City Attorney.

Department of Electricity.

Berry Street between Second and Third Streets is an Open Public Street.

January 21st, 1910.

Gentlemen: In response to Resolution No. 4356, approved September 10th, 1909, I herewith submit the following opinion respecting the litigation concerning Berry Street between Second and Third Streets:

On June 29th, 1905, the Pope & Talbot Land Company, a corporation, commenced an action against Frank A. Maestretti, Thomas F. Egan and Edward H. Aigeltinger, as members of and constituting the Board of Public Works of the City and County of San Francisco, and the City and County of San Francisco, a municipal corporation, in the Superior Court of this City and County for an injunction against the defendants, restraining them and each of them from going upon the land and premises hereinafter described and from committing trespass or waste thereon and from tearing down or destroying or removing any fences, buildings or walls or other structures or improvements thereon and removing any lumber therefrom and from throwing any portion of the said land or premises open to public use as a public street or otherwise, and a preliminary injunction was issued on said complaint.

The Pope & Talbot Land Company alleged in their complaint that it was the owner of and entitled to the possession of all that certain lot, piece or parcel of land situate, lying and being in the City and County of San Francisco, State of California, and bounded and particularly described as follows, to-wit:

COMMENCING at a point on the Northeasterly line of Third Street, distant thereon two hundred and forty (240) feet Southeasterly from the Southeasterly line of King Street, and running thence Southeasterly along the said Northeasterly line of Third Street eighty-two (82) feet and six (6) inches; thence at a right angle Northeasterly and on a line parallel with the said Southeasterly line of King Street eight hundred and twenty-five (825) feet; thence at a right angle

Northwesterly eighty-two (82) feet and six (6) inches, and thence at a right angle Southwesterly and on a line parallel with said Southeasterly line of King Street eight hundred and twenty-five (825) feet to the said Northeasterly line of Third Street, and the point of commencement.

And further alleged that no part of said land and premises has ever been dedicated to public use as a public street or highway or for any other purpose whatever and no part thereof has ever been taken, accepted, reserved, set aside or condemned for public use as a public street or highway or for any other purpose.

In my examination of the case I found that on November 16th, 1893, Emily F. Talbot et al, commenced an action against the City and County of San Francisco, which action was numbered 43,256, in the Superior Court of this City and County, to quiet title to the following described land:

COMMENCING at the point of intersection of the Northeasterly line of 3rd Street with the Southeasterly line of King Street and running thence Southeasterly along the Northeasterly line of 3rd Street two hundred and seventy-five (275) feet; thence at a right angle Northeasterly and on a line parallel with said Southeasterly line of King Street five hundred and fifty (550) feet; thence at a right angle Northwesterly two hundred and seventy-five (275) feet to the Southeasterly line of King Street; and thence at a right angle Southwesterly five hundred and fifty (550) feet to the said Northeasterly line of 3rd Street to the point of commencement, and that on April 9th, 1894, the City and County Attorney sent the following communication to the Board of Supervisors:

April 9th, 1894.

“To the Board of Supervisors: The communication of the Board enclosing petition of Boyd, Fifield and Hoburg, requesting that you instruct this office to file a disclaimer in the above suit, and asking for my opinion in the matter was duly received by me. The petition gives a full statement of the circumstances leading up to the filing of the complaint.

The property involved in the suit is one of the water lots granted by the State to this City for the term of 99 years, by the Act of March 26, 1851; and the plaintiffs derived title from an execution sale some time in the year 1851 under a judgment rendered in favor of Peter Smith and against the City and County of San Francisco. The Supreme Court has several times decided that the city's interest in such lands was subject to sale under execution. It would, therefore, be useless to present this question again to the Supreme Court.

Upon one of the official maps of this City (that of 1870), a small street called Hammond Place is delineated as running through this block from King Street to Berry Street. The mere placing of these lines upon the map would not create a street; and the petitioners assert that the strip of land marked as a street has never at any time been used by the public. This, of course, is something that this office cannot pass upon, as it would involve the taking of testimony, etc. But the present Board of Supervisors has investigated and decided this matter for itself, as appears from the following resolution, passed November 6, 1893:

'RESOLUTION NO. 9497 (third series). Resolved, That Hammond Place, between King and Berry Streets, in the block bounded by said King and Berry and Second and Third Streets be, and the same is hereby expunged from the official map of the City and County of San Francisco, and the Assessor and City and County Surveyor be and are hereby required to take notice of the same, so that the proper action may be taken and said street expunged from the records and official maps under the charge and control of said officers.'

If the Board of Supervisors is satisfied that Hammond Place has never been used by the public as a street, it is my opinion that the petition should be granted and that a disclaimer should be filed in the suit, in order to avoid the expense of litigation and the costs of court.

(Signed) HARRY T. CRESSWELL,
Attorney and Counselor."

Thereafter, on May 8th, 1894, the City and County Attorney served and filed a disclaimer in said action by order of the Board of Supervisors disclaiming any and all right, title and interest in the land described in the complaint in said action; and that thereafter a judgment was entered upon said disclaimer quieting the title of the plaintiff as against the City and County to the land described.

I filed an answer in the suit of the Pope & Talbot Land Company against Frank A. Maestretti, et al., on behalf of all the defendants denying that the plaintiff was the owner of and entitled to the possession of the property described in the complaint in said action and alleged that all of the land described in said complaint was the property of the City and County of San Francisco, a municipal corporation, and that the said lot, piece or parcel of real property at all times mentioned in said complaint was a public street of the City and County of San Francisco duly dedicated and accepted as such and known as Berry Street and that the plaintiff had no right, title, interest or claim upon the same or any part thereof.

On December 24, 1909, the case came on for trial in Department No. 8 of the Superior Court of this City and County and Judge Sturtevant after hearing the testimony of the plaintiff and the defendants rendered judgment therein and adjudged that the plaintiff, The Pope & Talbot Land Company, a corporation, was, at the time of the commencement of action and ever since has been and now is the owner in fee and entitled to the possession of all that certain lot, piece or parcel of land lying and being in the said City and County of San Francisco, State of California, and bounded and particularly described as follows, to-wit:

COMMENCING at a point on the Northeasterly line of Third Street, distant thereon two hundred and forty (240) feet Southeasterly from the Southeasterly line of King Street, and running thence Southeasterly along the said Northeasterly line of Third Street thirty-five (35) feet; thence at a right angle Northeasterly and on a line parallel with the said Southeasterly line of King Street eight hundred and twenty-five

(825) feet to the Southwesterly line of Second Street; thence at a right angle Northwesterly and along the said Southwesterly line of Second Street thirty-five (35) feet; and thence at a right angle Southwesterly and on a line parallel with the said Southeasterly line of King Street eight hundred and twenty-five (825) feet to the said Northeasterly line of Third Street and the point of commencement.

He also adjudged that the defendant, the City and County of San Francisco, a municipal corporation, was at the time of the commencement of this action, ever since has been and now is the owner in fee and entitled to the possession of all that certain lot, piece or parcel of land situate, lying and being in the City and County of San Francisco, State of California, and bounded and particularly described as follows, to-wit:

COMMENCING at a point on the Northeasterly line of Third Street, distant thereon two hundred and seventy-five (275) feet Southeasterly from the the Southeasterly line of King Street, and running thence Southeasterly along the Northeasterly line of Third Street forty-seven (47) feet and six (6) inches; thence at a right angle Northeasterly and on a line parallel with the said Southeasterly line of King Street eight hundred and twenty-five (825) feet to the Southwesterly line of Second Street; thence at a right angle Northwesterly and along the said Southwesterly line of Second Street forty-seven (47) feet and six (6) inches; and thence at a right angle Southwesterly and on a line parallel with the said Southeasterly line of King Street eight hundred and twenty-five (825) feet to the said Northeasterly line of Third Street and the point of commencement.

That the lot, piece or parcel of land hereinabove lastly described is and at all the times mentioned in said complaint was a public street in the City and County of San Francisco, and duly dedicated and accepted as such and known as "Berry Street" and that the plaintiff herein has no right, title, interest or claim upon the same or any part thereof, and the injunction in respect to said parcel of land was dissolved. The said judg-

ment being thereafter recorded in Judgment Book 28 at page 170 on file in the office of the County Clerk of this City and County.

As a result of this judgment the status of Berry Street is established and the rights of the City and County in the Southerly forty-seven (47) feet and six (6) inches of Berry Street between Second and Third Streets is confirmed and the City and County, by and through its proper officers, may proceed to remove any and all obstructions therefrom and throw the same open to the public as an open public street.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

What Bond is Required of Pacific Telegraph and Telephone Company, upon Tearing Up of Public Streets.

January 27th, 1910.

Gentlemen: I am in receipt of your letter dated December 28th, 1909, in the following terms:

“The Pacific Telephone & Telegraph Co., has been requested by the Board to file with His Honor, the Mayor, a bond in the sum of Five Thousand Dollars, (\$5,000.00), in conformity with the provisions of ordinance No. 658, New Series, of the Board of Supervisors, approved January 20th, 1909, and required from all persons, companies or corporations, tearing up the public streets, of the City and County of San Francisco, for their purpose of carrying on their operations in such streets.”

It is claimed by the Pacific Telephone & Telegraph Co., that they have given a bond under ordinance No. 253 and that they are not brought within the terms of ordinance No. 658.

The Board of Public Works, respectfully requests your opinion in the matter.”

In reply thereto I will state that Ordinance No. 658 (New Series) to which you refer, by Section 1 thereof, provides:

"It shall be unlawful for any person, firm or corporation having the right under Section 19, Article XI of the Constitution of the State of California, to lay down pipes or conduits in the public streets or thoroughfares of the City and County of San Francisco.

* * * * *

and then follows general provisions not pertinent to this matter.

And by Section 3 the Ordinance provides:

"It shall be unlawful for any person, firm or corporation above referred to, to open any public street or thoroughfare in the City and County of San Francisco until it has executed and filed with the Mayor an indemnity bond to be approved by the Mayor, in the penal sum of Five Thousand (5,000) Dollars in lawful money of the United States."

Section 19 of Article XI of the Constitution of the State of California provides:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purpose under and by authority of the laws of this State shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity for damages have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein and connections therewith so far as may be necessary for introducing into and supplying said city and its inhabitants either with gas lights or other illuminating light or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

From a reading of these provisions it is obvious that the application of the provisions of Ordinance No. 658 (New

Series) is confined to persons and corporations who have occasion to open streets for the purpose of laying pipes or conduits therein for the purpose of supplying the municipality with water or artificial light.

It is assumed, for the purpose of this opinion, that the Pacific Telegraph & Telephone Company does not have occasion to lay pipes or conduits for either of these purposes, and this being true, Ordinance No. 658 (New Series) cannot apply to that Company. It is, therefore, unnecessary for the Pacific Telegraph & Telephone Company to furnish a bond under the terms of that Ordinance, but the bond already furnished under the terms of Ordinance No. 253 is sufficient.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Per Diem Employes Whose Salaries Are Not Fixed by Charter, Not Entitled to Compensation When Absent on Account of Sickness.

January 31st, 1910.

Sir: I am in receipt of your communication dated January 24, 1910, in which you ask whether it is proper for employes in your Department to receive payment for time when they are absent from duty on account of sickness or other like causes.

The opinion given by this office relative to the salaries of Deputy Tax Collectors, and to which you refer in your letter, is not applicable to employes in your Department. A Deputy Tax Collector is an officer who is appointed under the terms of the Charter at an annual salary fixed by the Charter.

In an opinion rendered on April 14, 1909, by this office, a distinction was noted between an officer and an employe, and by that opinion the following test as to what constitutes an officer was laid down, viz.:

"One who receives no certificate of employment, takes no oath, has no tenure or term of office, discharges no duties and exercises no power depending entirely upon authority of the law, but simply performs such duties as are required of him by the persons employing him and whose responsibility is limited to them, is not an officer and does not hold an office, although he is employed by public officers and is engaged in public work."

By the terms of this test, so far as the facts stated in your letter show, assistants and other employees in your office are not officers. Moreover, these employees are not on annual salary fixed by the Charter, but are on monthly salary, and in some instances a per diem, fixed by resolution of the Board of Supervisors.

It follows that the custom which you have been following, to-wit, to give credit to an employee who is absent for legitimate cause for any overtime he may have worked and balance this up against such time as he may have been off duty, is a proper method to follow.

Respectfully,

PERCY V. LONG,
City Attorney.

Chief of the Department Electricity.

Advising as to Status of Nobles Alley as a Public Street.

February 3rd, 1910.

Gentlemen: I am in receipt of the following communication, dated February 3, 1910:

"I submit to you the matter of Nobles Alley, including a copy of Mr. J. B. Olsen's communication addressed to the Board of Public Works, and Mr. Holcomb's report on same addressed to Marsden Manson, City Engineer, January 31, 1910.

"Mr. Olsen claims that 'Nobles Alley' is private property and that the abutting property owners have the right to build, fence or close said alley.

"I would be pleased to have an opinion from you on this matter at your earliest convenience."

Opinion.

I have examined the report rendered by Mr. Charles Holcomb to Hon. Marsden Manson, on Nobles Alley, East from Grant Avenue, between Union and Filbert Streets, and from it and other sources the following facts appear:

That Irwin Hosford was the original owner of 50-Vara Lot 414, having obtained title thereto by a grant made by Hyde, Alcalde, on July 13, 1847. Afterwards the title to said lot became vested in one Francis Salomon, who made eight certain transfers to the various parcels thereof, extending from October 2, 1849, to September 1, 1853, reserving to himself, however, the land now known as Nobles Alley. Subsequently, on January 16, 1859, he quitclaimed to his said grantees or their successors in interest that portion of said Lot No. 414 theretofore used as an open alleyway (Nobles Alley), describing it by metes and bounds, but still reserving to himself a strip 1 foot 6 inches in width by 137 feet 6 inches in length on the North side of Nobles Alley. It does not appear that Nobles Alley was ever offered for dedication by deed, nor does it appear that it was one of the originally reserved streets upon any work adopted before the grant. "Where the land was not a part of one of the originally reserved streets, but came to private ownership under an Alcalde grant, the right to take it as a public street depends upon whether it has been dedicated as such." (De Martini vs. S. F., 107 Cal. 410.)

It further appears that Nobles Alley is laid out on the Humphreys Map of 1870 and the Tilton Map of 1889.

It was held in the case of Whelan vs. Boyd, 93 Cal. 500, almost identical with the matter involved here, that a strip of land was not conclusively proved to be a street because

it was laid down as such upon what is called "The Engineers' Map" and "Humphrey's Map" of the City and County of San Francisco. The Court said:

Foote, C.: "This action was to enjoin the excavation of what is claimed to be a private street or alleyway. The only question at issue seems to be, whether the land involved was or was not a public street. Findings were waived.

"The court below held, in effect, that it was conclusively proved to be a public street, because it was laid down as such upon what is called the 'Engineer's Map' and 'Humphrey's Map of the City and County of San Francisco,' and on that account would not allow the plaintiff to introduce proffered testimony upon the point that there had been no dedication by the owner of the land to the public use, and no user thereof by the public as a street.

"The land here involved came direct to the original owner under an Alcalde grant, and as private property. His grantee, through mesne conveyances, chose to make the land now in controversy a way for the common benefit of certain owners of lots who had purchased the same from him. Whether it also became a public street did not depend upon the fact alone that the land appears on these maps as a public street, but whether the proof showed that it had been offered for dedication, and accepted as such by user or otherwise.

"Upon these points the evidence offered was admissible, and it was prejudicial error to exclude it.

"The judgment and order should be reversed, and we so advise."

It is true that the decision in this case was reversed, and it was sent back for a new trial, but the doctrine enunciated by the Supreme Court was virtually determinative of the matter, and it is evident that a new trial, if the necessary evidence was introduced, as indicated by the Supreme Court, would result in favor of the defendant.

This case was approved in *Schmidt vs. San Francisco*, 100 Cal., 302.

“To constitute a valid and complete dedication two things must concur, to-wit: an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use, and an acceptance by the public of the dedication. *

* * Dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner.” (De Martini vs. S. F., 107 Cal., 410.)

“If a man has really acquired title to land he cannot afterwards be mapped out of it by other persons.” (Payne vs. English, 79 Cal., 547.)

These decisions make it very plain that the mere mapping of a street without being offered for dedication will not make it a public street.

There appearing no offer of dedication by deed from the owners of the land now known as Nobles Alley, there remains but one other method by which dedication of a street can be effected, and that is in the manner indicated in De Martini vs. S. F. (above).

“The fact that a strip of land has been continuously treated and used by the general public as a highway for twenty years, with the knowledge of the owner of the fee, and without objection by him, does not justify a finding that the strip is a public highway, since such facts are consistent with an absence of intention to dedicate, and may indicate merely a license.” (Cooper vs. Monterey, 104 Cal., 457.)

This entire question as to whether or not Nobles Alley is a public or private alley, in the absence of any evidence of an intention on the part of the owner to dedicate it as a public street, is a pure question of fact, requiring the examination of witnesses, and the City Attorney has no power or authority to subpoena witnesses or administer oaths.

Litigation respecting this alley was presented to the Supreme Court of this State on the appeal of the People Ex Rel. Bolton, respondents, vs. Noble, appellant, in which the Court rendered a decision on the 7th day of June, 1883, as follows:

By the Court: "We are of the opinion that the proofs failed to sustain the allegation of the complaint and the findings of the Court that the alleyway denominated Noble Alley was a public street and highway, accepted as such by the City and County, is that they failed to show a dedication as such by the owner. Judgment and order reversed and cause remanded for new trial."

It is impossible for me to say what testimony, either verbal or documentary, was introduced at the trial of the case in the Court below. By the reversal of the judgment and the remanding of the case for a new trial by the Supreme Court, the matter stands in the same condition as it was before the commencement of any litigation respecting it, as it does not appear that there was a re-trial of the issues involved.

From the above the following facts are deduced:

That there was no dedication by deed by the owner of the land now known as Nobles Alley.

That the mere placing of a street upon the maps does not make it a public street.

That the question whether or not Nobles Alley was dedicated to public use by user on the part of the general public, with the knowledge and consent of the owner and without any objection on his part to such use by the public for the requisite length of time to effect such dedication, is a question of fact which I am not empowered to inquire into.

As was said by the Supreme Court in *re Gilfillan vs. Shattuck*, 142 Cal., at p. 32, which concerned Miles Court in 50 Vara Lot 124, on the northeast corner of California and Powell Streets:

"A cul-de-sac, such as the one here in question, is not a thoroughfare, which is 'a passage through,' 'a passage from one street or opening to another.' (Webster's Dictionary; *Woodyer vs. Hadden*, 5 Taunt., 125, and *Bateman vs. Bluck*, 14 Eng. Law & Eq., 69.) Whether such a cul-de-sac can be a public highway has been a mooted question. (See the two English cases above cited and the notes to *Sheafe vs. People*,

29 Am. Law Rep., at page 51.) There are not many decisions on the subject.) However, it may perhaps be correctly said that it is not a legal impossibility for a cul-de-sac, though not a thoroughfare, to be a public highway; but in such case a verdict or finding that such a choked-up and abortive passageway is a public highway should be supported by very clear and satisfactory evidence; and certainly a verdict that it is not a public highway should not be disturbed on appeal, unless the evidence is almost overwhelmingly the other way. And the question is mainly one for the jury."

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Playground Commission May Purchase Lease Upon Property
for North Beach Playground.**

February 7th, 1910.

Sir: I am in receipt of your communication of February 1, 1910, in which you state that the City and County of San Francisco is the owner of certain land which it has transferred to the management of the Playground Commission as a portion of the North Beach Playgrounds. This property is subject to lease which terminates in 1912, and which deprives your Commission of the beneficial use of the property until that time. You desire to know whether it is within the power of the Playground Commission to purchase this lease.

Opinion.

By Article 14a, Section 5, providing for the powers of the Playground Commissioners, it is enacted:

"The Commissioners may purchase, in the name of the City and County of San Francisco, lands to be used as Children's Playgrounds and Recreation Centers, with any moneys

legally appropriated for such purpose or acquired by gift, legacy or bequest for such purpose."

This provision gives the Commission the general power to purchase lands, and under the doctrine of implied powers I think this provision is broad enough to authorize the Commission to purchase a lease which stands in the way of the beneficial use of lands under its management.

In the case of Central Ohio Natural Gas and Fuel Company vs. Capital City Dairy Company, 60 Ohio State, 6, it is held:

"The implied powers which a corporation has in order to carry into effect those expressly granted and accomplish the purposes of its creation, are not limited to such as are indispensable to such purposes, but comprise all that are necessary in the sense of appropriate, convenient and suitable, including the right of reasonable choice of means to be employed."

This same rule of construction would doubtless be applied to the construction of this Charter provision and under it I believe that the Commission has full power to remove from any land owned by the City and under the management of the Commission an encumbrance which prevents the beneficial use of that land for the purposes of the Commission. Of course, such purchase must be made subject to the express proviso in the Charter that the purchase may be made only "with any moneys legally appropriated for such purpose or acquired by gift, legacy or bequest for such purpose."

Respectfully,

PERCY V. LONG,
City Attorney.

Secretary, Playground Commission.

Judgment in Boyd vs. Maestretti Prevents Use of Public Library Grounds as Site for City Hall.

February 14th, 1910.

Gentlemen: I am in receipt of your communication dated February 3, 1910, in which you ask whether your Board can use the Library site on Van Ness Avenue and Hayes Street for the purpose of constructing a temporary City Hall building thereon, and you further ask the effect of Judge Seawell's decision in the case of Boyd vs. Maestretti et al., upon this question.

Opinion.

Boyd vs. Maestretti et al. was an action numbered 2670, brought in the Superior Court of the City and County of San Francisco by Boyd, a taxpayer, vs. the then members of the Board of Public Works of this City and County, to restrain by injunction the use of the Library site referred to for the purpose of constructing a temporary City Hall thereon. On December 20, 1906, the Court rendered its decision granting a permanent decree of injunction to the plaintiff and against the members of the Board of Public Works and their "successors, agents, servants and employes" to restrain them from taking any steps towards the construction of a temporary City Hall upon the Library site. This decree has never been modified and could probably still be invoked as against the Board of Public Works. The pleadings in this case show that the Library site was purchased with money raised by a bond issue authorized at a special election held September 29, 1903, and that the bonds were authorized and sold for the specific purpose of purchasing a library site and erecting a library thereon. The decision in the case is based upon the theory that the Board of Supervisors have no power to divert the use of a library site, purchased under such circumstances, to any other purpose.

I quote the material portion of the final decree of injunction:

"It is hereby ordered, adjudged and decreed that a writ of injunction issue herein commanding said George F. Duffy, Edward A. Aigeltinger and Thomas F. Eagan, constituting the Board of Public Works of the City and County of San Francisco, defendants herein, and each of them, and their and each of their successors, agents, servants and employes, to refrain from entering into or upon the parcel of land hereinafter described or any part thereof for any purpose other than the erection thereon of a building or structure to be used for and as a public library and reading room or for a purpose connected therewith, and from in any manner diverting said parcel of land or any part thereof to any use or purpose other than a use or purpose connected with the purpose of a public library or reading room and from erecting or proceeding with the erection of any building or structure to be used for any other purpose than a public library and reading room.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Property Dedicated for a Public Women's Hospital Must Be Used for That Purpose, and May Be Leased to "San Francisco Home for Incurables" if They Carry Out the Purposes of the Dedication.

Gentlemen: I am in receipt of your letter of February 2, 1910, in which you ask whether or not the Supervisors can by resolution authorize the lease of the hospital site belonging to the City and County of San Francisco and described as the two middle 50 Vara Lots in Block 579, bounded on the East by Baker Street, on the West by Lyon Street, on the North by Clay Street and on the South by Sacramento Street, said lots having a frontage of 137½ feet on Clay and Sacramento Streets, to the "San Francisco Home for Incurables,"

under similar conditions to those contained in a former lease to the California Woman's Hospital, to-wit: the maintenance of a certain number of free cots. You also ask whether this site can be leased for any other than hospital purposes.

Opinion.

The site that you refer to was set aside under the terms of an Act passed by the Legislature of the State of California and approved March 27, 1868, and a report of the Committee on Outside Lands thereafter filed, under authority of which it was dedicated for public use as a woman's hospital. The proceedings resulting in the dedication of this site for this purpose are found in the Municipal Reports of 1868-9, page 553 et seq.

As stated in my opinion of April 30, 1909, given to the Board of Park Commissioners, "the general rule is that when land has been given for and dedicated for park purposes, or has been acquired by the municipality through moneys raised by assessment upon a particular district, that the purpose for which it has been acquired cannot be altered or enlarged."

Quoting *Spire vs. City of Los Angeles*, 150 Cal., 70-71.

This opinion referred particularly to Golden Gate Park, but as the Park was dedicated under the terms of a similar Act and under similar conditions as those under which the hospital site referred to was dedicated, the hospital site would be governed by the same rule as that applied to the Park.

I must therefore advise you that your Board has no authority to authorize the lease of these premises for any other purposes than that of a hospital.

I assume that the "San Francisco Home for Incurables" will reserve free cots for the use of woman patients so as to effect substantial compliance with the terms of the grant under which the City and County took this property, and this being true, your Board has authority to lease the hospital site to that corporation.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Firemen in Theatres—Ordinance May Require Their Presence, but Payment of the Expense Should be Provided in the Regular Theatre License Ordinance.

February 17th, 1910.

Gentlemen: I am in receipt of your letter of February 11th, in the following terms, to-wit:

“At a meeting this Board, held on the 10th instant, a report was received from the Chief Engineer of this Department (a copy of which is hereto attached) to the effect that the owners or managers of the different theatres have neglected or refused to comply with the provisions of Section 186 of the new Building Law in paying into this department the salaries of the members thereof who have been detailed for fire duty to their respective theatres since January 3, 1910.

“In view of this fact, this Board respectfully request that you kindly furnish it with an opinion as to if it is within the province of this Department to proceed further in this matter, and if so, what procedure it shall take to enforce the compliance with that provision of the Building Ordinance.”

Section No. 186 of Ordinance No. 1008 (New Series) provides that the Chief Engineer of the Fire Department shall detail an experienced member thereof for service at every building used for theatrical and operatic purposes to be present on the stage during the progress of every performance held therein, and requires that the salary of said member shall be chargeable against the management of said building.

I will state, first, that the purpose of this requirement is so intimately associated with the preservation of public safety that it cannot be doubted but that the Supervisors have the right to make such a requirement as an additional safeguard against fires under Article II, Chapter II, Subdivision 1 of the Charter, which authorizes them “to ordain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations.” The power to make police regulations undoubtedly gives the

authority which is attempted to be exercised in Section 186 above referred to. (See Abbott Municipal Corporations, Sec. 125.)

“Another valid exercise of the police power by the State is the adoption of rules and regulations in regard to the *
* * * occupation of buildings. These regulations have for their direct purpose not only the protection of life, limb and property, but also the preservation of public health.”

General experience has shown the necessity for special precautions against fires originating in theatres and the presence of a trained fireman on the stage of the theatre is a very proper precaution to be taken.

It is doubtful if the second requirement of said Section No. 186, which provides that the management of the theatres shall pay the salary of the man detailed for said service, is valid. The salaries of all members of the Police Department are fixed by charter (see Art. IX, Chap. VIII, Sec. 1) and are payable directly out of the public treasury. As a consequence this is not a case where the official performing the service is dependent for his compensation upon the fees collected.

Thus Section No. 186 provides for a charge payable to the municipality itself and its effect is to indirectly impose a license tax upon theatres and buildings used for theatrical purposes. There is already an ordinance which directly imposes a license upon the conduct of the theatrical business, and it would seem to be far more proper for the Board of Supervisors to provide in a single ordinance for the full amount of license tax which is to be collected from theatres.

The necessary expense of supervision of a business which must be regulated for the purposes of public safety is a proper element to be included in such a license tax. (See Abbott, Municipal Corporations, Sec. 123.)

“The power (to impose a license tax) also includes the imposition of license fees to defray expenses connected necessarily with supervision, having for its object the preservation of public health (or safety).” (See also *Philadelphia vs. Postal Cable Co.*, 31 N. Y. Supp., 556.)

It would seem to me, therefore, better policy for the Board of Supervisors to repeal that portion of Section 186 of the Building Ordinance which provides for the imposition of these charges upon the management of theatrical enterprises and to enact a new ordinance licensing theatres, which shall increase the amount required to be paid by them to a sum sufficient to defray the cost of keeping a member of the Fire Department on the stage during performances.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

**Advising as to Permit to Sutter Street Railway Company on
Lower Market Street, and Effect Upon Geary Street
Municipal Road.**

February 19th, 1910.

Gentlemen: I am in receipt of the following request for an opinion from your Committee:

“Please advise the Committee if by granting to the Sutter Street Railway Company a temporary permit, revocable at will of the Board of Supervisors, to operate their cars down Market Street from Sansome Street to the Ferries, will in any wise jeopardize the right of the City to operate the cars of the Geary Street Railway from Kearny Street to the Ferries.

“Also as to whether the best interests of the city are sufficiently protected after a permit of this kind has been granted to the Sutter Street Railway Company.

“Please state further whether it will be necessary to pass this permit by ordinance through the procedure necessary in the granting of franchises.

“Also whether the City’s interests are sufficiently protected, and the proposed line of the Geary Street Railway

that the City intends to run to the Ferries is protected in the procedure above quoted, that is, through the granting of a temporary permit to the Sutter Street Railway Company, revocable at will of the Board of Supervisors."

Opinion.

Taking up the questions out of their order, I will treat question No. 3 as coming first.

On May 24, 1899, the then City Attorney, Franklin K. Lane, rendered an opinion to the Board of Supervisors upon two questions:

1. As to the proper action to be taken on the application of the Market Street Railway Company for permission to change the motive power to electricity on certain of its street railway lines from that provided in the order granting the franchise for said lines.

And

2. As to the mode and manner to be followed if deemed advisable by the Board to grant the privilege petitioned for.

In discussing the right of the Board of Supervisors to grant the permission requested Mr. Lane uses this language:

"It seems, therefore, beyond serious question, that the city has power to grant permission to the Market Street Railway Company to use electricity over the street railroad systems here concerned, and that such privilege may be validly exercised. Such permission may, however, be granted, subject to any conditions which your Board may deem reasonable to impose and to make for the benefit of the city. I take it as unquestionably the law, that in your hands rests the power to say in what manner this power to use electricity may be exercised, and to say generally under what conditions all such privileges shall be granted."

Then follows mention of the Act of the Legislature of 1897, which is similar to the provision in our Charter for the grant-

ing of street railroad and other franchises. This is followed by a discussion of the case of San Francisco and San Joaquin Railroad vs. Craycroft, Trustee of the City of Fresno, 111 Cal., 544, in which the Supreme Court of this State held that while the right of the Valley Road to run through the City of Fresno was such a privilege as would ordinarily compel the trustees to sell to the highest bidder, still where the privilege was such as could be enjoyed by the applicant, and the applicant only, there could not be, in the nature of things, any competition for the purchase of the franchise, and that the law was not intended to apply to such a case, but only to those cases—as of street railroads—in which bona fide competition is possible.

Mr. Lane then says:

“If any privilege may be used by, and may be of value to more persons than the petitioner therefor, it would, in my judgment, be a privilege which should be open to competition under the statute.

“In case you find that the privileges for the purposes granted may be subject to competition, I advise such privileges be granted under the provisions of the Act of 1897.” (Opinions of City Attorney Lane, page 82.)

Again, on September 22, 1900, after the Charter had gone into effect, City Attorney Lane rendered an opinion to the Board of Supervisors in the matter of the application of the Market Street Railway Company to operate its Fifth Street Railroad by means of electricity, and as to whether or not it was within the power of the Board to grant such a privilege. City Attorney Lane there held that:

“The right to change from one form of propelling power to another with the consent of the Municipal Council cannot be denied. * * * In view of the provisions of the Charter granting power to regulate street railroads and the use of the streets, there can be little doubt but that the Board of Supervisors has power, if it sees fit, to grant the privilege here sought.” (Opinions of City Attorney Lane, page 360.)

The opinion of former City Attorney Lane has heretofore been followed.

The determination of the question whether the grant is subject to competitive bidding must first be made by the Board of Supervisors. If this is determined in the affirmative, then all the conditions and limitations of the Charter regarding the letting of franchises must be strictly followed; if, on the other hand, the Board determines that the grant is not subject to competition, then it partakes of the nature of a privilege rather than of a franchise, and the Charter provisions relative to competitive bidding do not apply. In such case the permit should be granted by ordinance in the manner prescribed in Section 6 of Chapter II, Article II of the Charter omitting the competitive bidding features.

In adopting the procedure heretofore outlined it must be borne in mind that a determination by the Board of Supervisors that the privilege is not subject to competition may be construed as a recognition of the right of the Sutter Street Railway Company to operate on the outer tracks on Market Street and might preclude the City from afterwards asserting, in connection with the municipal road, that such right has been forfeited by the Sutter Street Company. In other words, the determination by the Board that this permit is not subject to competition may necessarily be based upon the theory that the Sutter Street Railway Company and the United Railroads have the exclusive right to the use of lower Market Street for street railway purposes.

Answering questions Nos. 1, 2 and 4, it seems to me that the course for the Board of Supervisors to follow is one to be determined by it as a matter of best policy and judgment. Therefore, if the Board wishes to make absolutely certain the right of the City to operate its own street railway system on Market Street from Geary Street to the Ferries, then it can best do so by making as a condition for the granting of the permit the stipulation that the Sutter Street Railway Company will recognize the right of the City to operate its cars over the same route.

If, however, the Board should, after a determination of the competitive question above outlined, determine to grant the privilege or issue the franchise, as the case may be, to the Sutter Street Railway Company, without the condition immediately above set forth, then such privilege or franchise should be granted subject to an express stipulation that such grant is made and accepted upon the condition that the City shall lose none of its rights to operate a street railway system of its own over the same portion of the street covered by the grant, and that the City, through the issuance of the grant, does not recognize the right of the Sutter Street Railway Company or the United Railroads, together or separately, to an exclusive use of Market Street for railway purposes.

Respectfully,

PERCY V. LONG,
City Attorney.

Public Utilities Committee.

Property Purchased for Playgrounds at Seventh and Harrison Streets Cannot Be Used for City Hall. Case of Boyd vs. Maestretti Governs.

February 24th, 1910.

Gentlemen: I am in receipt of your letter of February 17th in the following terms:

"I am directed by the Playground Commission to inquire if your opinion relative to the use of the Library site for the location of a temporary City Hall would apply to grounds set aside for the purposes of the Playground Commission, under the bond issue of 1905. The Board of Supervisors desire to know from the Playground Commission if the site at Seventh and Harrison Streets can be used by the City for a City Hall.

In view of the Board of Supervisors' request, work on the Seventh and Harrison Streets playgrounds is being delayed

and the Public Buildings Committee expects an answer from the Playground Commission by Wednesday, February 23, 1910. Your opinion in this matter would serve to guide the Commission in its reply to the Board of Supervisors."

The purchase of the property at Seventh and Harrison Streets was made at the same time and under the same conditions and the same means were employed as those employed in the purchase of the Library site referred to in my opinion to the Board of Supervisors, dated February 14, 1910. This property was purchased for use as a children's playground, and its dedication to that particular use precludes its diversion to use as the site for a temporary City Hall or for any other use inconsistent with that to which it was dedicated. The decision in the case of *Boyd vs. Maestretti*, No. 2670, brought in the Superior Court of the City and County of San Francisco, determines this question, and as long as that decision remains in force, it furnishes the governing rule as to the use of property purchased under the terms of the bond issue of 1903.

Respectfully,

PERCY V. LONG,
City Attorney.

Playground Commission.

Rents Due the City on Leases Should Be Collected by Public Officials.

February 25th, 1910.

Dear Sir: I am in receipt of your letter dated February 15, 1910, in the following terms:

"It has been the custom of the Southern Pacific Railroad Company to pay to the Mayor of the City a certain sum of money as rent for certain lots occupied by them under lease. The Mayor's office has notified them to pay said rent to the

Thevor & Sloane Company, who have been appointed agents for the Mayor in these collections. The Southern Pacific Company prefer to pay the money direct to the Treasurer and obtain his receipts for the same. Will you kindly advise this office if those rents should come to us through the Mayor's office or should I receive them direct from the company?"

Article II, Chapter II, Section 1 of the Charter provides that the Board of Supervisors shall have power (Sub. 12) "to purchase or acquire by condemnation such property as may be needed for public use," and (Sub. 32), "to provide for the lease of any lands now or hereafter owned by the City and County. * * * "

Under the authority vested in the Board of Supervisors by virtue of these provisions of the Charter, certain leases have been made or acquired by the City and County whereby rents are payable to it. Most of these leases, I understand, have been acquired as incidents to the purchase of property acquired for municipal use by the City and County. There is no express provision in the Charter which designates a public official to whom the moneys due under these leases shall be paid. Under these circumstances I am of the opinion that the Board of Supervisors as an incident to their power to purchase property and to lease the same can properly provide both for the method of making payments which accrue under the terms of the lease and the public official to whom such payments shall be made, and, of course, when the Supervisors by resolution provide that the Mayor shall make these collections it becomes proper for him to do so.

The duty of the Treasurer is generally to receive and pay out funds. All payments which are made by him must first be authenticated by the Auditor and as a general thing all receipts which come into his hands are authenticated by the public officials whose duty it is primarily to make such collections. I am of the opinion that it is more proper that all payments made to the Treasurer be so authenticated, but where the Supervisors do not delegate any official to receive such payments, the Treasurer may properly accept them under his general powers.

The collection of public funds is a public duty, and it cannot properly be delegated to a person who is not a public official.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

Resolution by Board of Education, and Not Its Communication to Teacher by the Secretary, Determines the Status of the Teacher.

March 1st, 1910.

Gentlemen: I am in receipt of your letter dated February 10, 1910, in the following terms:

“There is upon our records the following resolution:

“Resolved, That Miss Charlotte Cerf be and she is hereby assigned to the Polytechnic High School, vice Mme. E. C. Gifford, transferred, to take effect February 3, 1908.’

“In communicating this resolution to Miss Cerf, the Secretary wrote as follows:

‘At a meeting of the Board of Education, held December 19, 1907, the following resolution was adopted:

‘Resolved, That Miss Charlotte Cerf be and she is hereby regularly appointed a teacher in the San Francisco School Department, and assigned to the Polytechnic High School.’

“The resolution on the books does not make Miss Cerf a regular teacher, but, under the rules, she should teach a probationary period of two years, under which ruling she would be receiving a salary (which at the present time is being paid her) of some \$15.00 less than she would be entitled to receive had she been regularly appointed a teacher, as stated in the letter addressed to her.

“The School Board desires to know what salary Miss Cerf can legally claim from the School Department; in other words,

is the Board held by the resolution as it stands on the minute books, or by the written communication of the Secretary?"

Opinion.

The Board of Education is vested with power, under the terms of Article VII, Chapter III, Section 1, Subdivision 2 of the Charter "to employ such teachers and persons as may be necessary to carry into effect its powers and duties; to fix, alter and approve their salaries, compensation, etc." The Board is also authorized to employ a Secretary, who shall not be a member of the Board, and whose duties are not expressly provided for.

The passage of the resolution by the Board of Education, referred to in your letter, and which in terms employs Miss Charlotte Cerf as a teacher, was a proper exercise of the power of the Board, and is the only exercise of power which could be binding upon it. The Secretary in communicating a resolution of this character to the teacher employed could not make any alteration in its terms which could affect the teacher's rights. The Secretary has no authority in such a matter, and it is the Board of Education solely who can determine the terms of employment of a teacher in your Department.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

Status of Cases of Elmer Hoyt, W. E. Little, A. Rapp and Peter Larsen, Former Hostlers in Fire Department.

March 5th, 1910.

Gentlemen: In reply to your favor of February 26, in which you submit for my consideration a copy of petition from Elmer Hoyt, W. E. Little, A. Rapp and Peter Larsen, former hostlers in the Fire Department, for back salary

alleged to be due them, with a request that I furnish you with an opinion upon the following points:

“1. Has this Board the legal right and power to allow these claims and approve of demands on the treasury therefor, provided the allegations, as set forth in the said attached petition, are true and correct?

“2. Can this Board allow and approve of demands upon the Treasurer of the City and County, to be payable out of the appropriation for the current fiscal year, for claims incurred or contracted during a former fiscal year and for which no funds are specifically set aside by the Auditor, as in this particular case herewith submitted?”

I copy from the petition you inclosed with this request for an opinion as follows:

“Thereafter said hostlers commenced proceedings in the Superior Court of the State of California in and for the City and County of San Francisco, praying that said Fire Commissioners be ordered to pay said hostlers \$15.00 per month each, from November 27, 1907, until the date that said dismissals were made, being the difference between the \$85.00 a month which they were paid and the \$100 per month which was due them according to law. After hearing the defense of said Fire Commissioners as well as said hostlers, said Superior Court decided that said hostlers were justly and legally entitled to said \$100 per month from said November 27, 1907, but also decided that said Superior Court could not order said sum paid to them by virtue of said proceedings, although it appears from said decision that said sums are legally due and justly due said hostlers, and no part of which sums have ever been paid.”

Opinion.

Answering your first inquiry, the case of Elmer Hoyt vs. The Board of Fire Commissioners, Etc., No. 23882, in the Superior Court of this City and County, was a case in which

petitioner Elmer Hoyt prayed for a writ of mandate to be restored to the rolls of the Fire Department of this City and County as a hostler, on the theory that he had been dismissed from his said employment without a trial, it being claimed that he was entitled to a trial under the provisions of the Charter.

The Court decided that Elmer Hoyt had been from July 3, 1903, to June 1, 1909, a temporary employee in the said Fire Department, holding terms of employment from month to month; that he had at no time been such a regular member of the Department as to be so entitled to a trial in the event of dismissal, and that the last temporary appointment was made for the month of May, 1909, and there having been no appointments subsequent to that date his employment ceased and he was no longer connected with the Department, and therefore the writ of mandate was denied and judgment was given for defendants, Board of Fire Commissioners. There was no money judgment asked against the City and County, and in its findings and judgment the Court makes no reference at all to any sum of money due to plaintiff, legally or otherwise. The Court did, however, say in its written *opinion*—not in its final judgment—“the hostlers are entitled to compensation at the rate of \$100.00 per month from the time that the amendment to the Charter increasing their compensation became effective.”

This as an abstract proposition is of course correct, but this office stated to the Court after this opinion was filed that we did not understand the Court to indicate that any money judgment was intended, inasmuch as that question had not been gone into at all in that case. Indeed, that it could not have been gone into as no money judgment had been asked for. The Court instructed me that I was correct in my understanding of the opinion, and the judgment above indicated was finally prepared and signed and filed.

The action described in the petition referred to as “praying that said Fire Commissioners be ordered to pay said hostlers \$15.00 per month from November 27, 1907, until the date that

said dismissals were made, being the difference between the \$85.00 a month which they were paid and the \$100.00 per month which was due them according to law," is another action filed in the Superior Court of this City and County, entitled Gustave Rapp vs. City and County, etc., No. 23,485, in which Mr. Rapp, suing on behalf of himself and Elmer Hoyt and William E. Little and Peter Larsen, who assigned their claims to Rapp, sued for the back salary due them on the theory above indicated. This action is now pending before Judge Hunt. This office has filed a demurrer on behalf of the City and County, and that demurrer has not yet been disposed of. In my opinion the City has a complete legal defense to this action, which has been properly raised by the filing of the demurrer, to-wit: the defense that no proper demand was ever made for the salaries sued for, as required by the Charter. I therefore advise you that there is no legal liability upon the city to pay these claims.

Answering your second inquiry, I call your attention to the following from Section 13, Chapter III, Article III, of the Charter:

"Every demand against the City and County shall in addition to the other entries and indorsements upon the same required by this Charter show * * * 5. The name of the specific fund out of which the demand is payable. Each demand shall have written or printed upon it a statement that the same can only be paid out of the income and revenue provided collected and paid into the proper specific fund in the treasury for the fiscal year within which the indebtedness was incurred and shall refer to Chapter II of this Article, and be numbered with reference to the fund out of which it is payable."

I therefore advise you that your Board should not allow and approve demands upon the Treasury of the City and County to be payable out of the appropriation for the current fiscal year for such a claim as in the petition herein set forth, incurred or contracted during a former fiscal year and for which no funds are specifically set aside.

In addition I advise that the defence that may be urged as above suggested in answer to your first inquiry, to-wit, that the demands for salary were not made in accordance with the requirements of the Charter, must be kept in mind in considering the answer to your second inquiry. Section 1, Chapter IV, of Article III of the Charter provides among other things that—

“Any demand upon the treasury accruing under this Charter shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such demand became due and payable, etc.”

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Fines for Violation of Fish and Game Laws Should be Paid to State Treasurer by San Francisco Treasurer. Charter Thirty-day Rule Does Not Apply.

March 7, 1910.

Gentlemen: I am in receipt of your communication of February 16th, in the following terms:

“Chas. A. Vogelsang, Chief Deputy, California Fish and Game Commission, appeared before the Finance Committee of the Board of Supervisors at its last meeting on February 11th, requesting that claims of his Commission against the City and County, of the year 1907, ranging from May 9th to October 30th of that year, and sworn to in this office on December 27th, 1909, for refund of fines imposed for violation of Section 628 of the Penal Code, relating to the Fish and Game Laws, should be allowed.

The Finance Committee requests that you advise it, at your early convenience, whether or not old claims of this kind, or of a similar nature, should be allowed."

The claims of the Fish and Game Commission for money collected as fines for violation of the fish and game law arise under Section 631b of the Penal Code, which provides as follows:

"All fines paid or collected for the violation of any of the provisions of Section 626 * * * must be paid by the court in which the conviction shall be had and into the State Treasury to the credit of the Game Preservation Fund. * *

Under the terms of this section moneys collected as fines are paid to the City Treasurer by the Court merely for the purpose of holding the same until they can be properly transferred into the State Treasury. Consequently claims for such moneys are not the ordinary claims arising under the Charter and are not barred by the provisions of Chapter IV, Section 1 which requires the presentation of "any demand upon the Treasurer accruing under this Charter" within thirty days after the demand became due and payable.

The disposition of fines for misdemeanors punishable by State law and not by municipal ordinance, is not a municipal affair. *City of Marysville v. County of Yuba*, 1 Cal., App. 628.

In all municipal matters claims are required to be filed within thirty days after they accrue, by the strict terms of the Charter. Claims for the recovery of these fines, however, stand in a class by themselves and are not governed by the general rule.

I must, therefore, advise you that the particular claims for the moneys referred to should be passed by the Board of Supervisors and paid. This opinion does not refer to any claims for any moneys except those expressly referred to herein.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Advising that Action of Supervisors in Directing Franchise Forfeiture Suits to Be Brought Makes Unwise the Granting of any Permit to Sutter Street Railway Co. and United R. R. to Use Outer Tracks on Market Street.

March 16th, 1910.

Gentlemen: In reply to yours of March 10th, 1910, wherein you ask me to suggest the necessary changes and alterations in the resolutions submitted by you granting a permit to the Sutter Street Railway Company and the United Railroads to operate cars on the outer tracks on lower Market Street by electricity, I respectfully submit that in view of the action taken by the Board of Supervisors on Monday last whereby I was requested to initiate the necessary proceedings to have declared forfeited the franchises in different portions of the City, it would greatly embarrass this office in the prosecution of such suits if any permit were granted to the Sutter Street Railway Company for the purposes contemplated by this resolution or if any other recognition of the Sutter Street Railway Company were made by your Board.

I therefore earnestly urge that your Committee decline to take any action granting a permit of any kind to the Sutter Street Railway Company or any action which will in any way recognize such Company in the use of these outer tracks on Market Street.

Respectfully,

PERCY V. LONG,

City Attorney.

Public Utilities Committee.

Advising as to Title Relative to Purchase of Lake Eleanor Lands and Properties.

March 18th, 1910.

Sir: Replying to yours of March 10th relative to the purchase of Lake Eleanor lands and properties, I submit the following:

I have examined the title to all lands involved in the \$400,000 purchase as appears from the "Abstract of Title of Lands in Sections 34, 35 and 36, Township 2, N. Range 19 E. M. D. M. around Lake Eleanor" compiled by Sonora Abstract and Trust Co., December 5th, 1908, and telegraphic continuation thereof dated July 2nd, 1909. From these I find the title to be in the Sierra Ditch and Water Company. I am informed by Mr. Lilienthal that a deed has been made by the Sierra Ditch and Water Company to the Tuolumne Water Supply Company and placed in escrow and that satisfactory evidence of this transfer will be furnished us in the event that the proposed contract is signed.

As to the water rights and other properties mentioned in your communication, I have examined the record as disclosed by the "Abstract of Title to water locations, etc., on Cherry and Eleanor Creeks, Main Fork and Main Tuolumne River in Tuolumne County, California" compiled by the Sonora Abstract and Trust Co., August 26th, 1909. I will state that it is impossible for me to pass upon the title to these rights at this time. As far as the record shows I believe that the appropriations have been proper and in legal form but as, under the laws of this State, the right to water by appropriation is dependent upon the actual user and as no property right accrues until actual use has commenced, you will readily see that it is a question of fact and not of record whether these various appropriations have been prosecuted to the point where they become converted into what we might call property. In order to satisfy ourselves on this matter it is necessary to have a competent engineer to personally examine each appropriation and to determine whether or not as a matter of fact the water filed upon has been actually used.

As to the prices proposed to be paid to the Tuolumne Water Supply Company I will say that the only information I have upon this subject is that contained in the abstract of title of land surrounding Lake Eleanor (above referred to), wherein it appears that these lands were assessed in 1908 for \$14,890. These are the lands which are included in the \$400,000 pur-

chase. In addition to these lands the water rights on Kibbe Lake and Twin Lakes (which have been denied by the Secretary of the Interior) and the riparian right in Section 16 are included. I have no information as to the value of these latter rights.

As to the properties included in the \$600,000 option, there seems to be no way of fixing a definite value. The rights included therein (with the exception of Section 16 and the two parcels of 160 acres each, known as Suttle-Price Tract and the Morales Tract) are water rights and claims under appropriations made in accordance with the State laws and subject to the rule of user heretofore mentioned. The value of these rights can be fixed only in relation to the necessity of their acquisition taken in connection with a complete scheme of development. This is an engineering problem solely.

I am not aware of any reason why the proceeding should not be consummated as set forth in the Bill. I firmly believe that it is necessary for the City to acquire and own all of the properties designated in the \$400,000 purchase and that the City can advantageously use all of the other rights designated in the option. Unless these properties and rights are purchased in the manner proposed by the Bill it will be necessary to acquire them by condemnation proceedings in order that the plan of the City to develop and use the waters of Lake Eleanor may be consummated.

As said above, the title of all of the lands, water rights and properties, so far as it can be determined from the public records, is clear; the title of the water rights and claims based upon the appropriations and filings under the State law, so far as they are of any value, must be determined by an actual examination upon the ground.

The taxes upon these properties have not been fully paid but our custom has always been in these matters to have the taxes paid prior to or at the time of the transfer. The examination of the water rights, I understand, cannot be made prior to the first of May on account of snows and should take from two to three weeks.

I enclose option for Cherry Creek properties which has been agreed upon by Mr. Lilienthal and myself.

Respectfully,

PERCY V. LONG,
City Attorney.

Hon. P. H. McCarthy, Mayor.

**City is not Liable to Pay Various Architect's Claims Arising
From Ordinance No. 49 N. S.**

March 18th, 1910.

Gentlemen: I am in receipt of your communication of the 10th inst., in which you ask to be advised as to the liability of the City for payment of architect's fees to Mr. M. J. Lyon who drew plans for the Madison and Marshall Schools under and by virtue of his appointment by the Board of Supervisors by Resolution No. 565 (New Series) approved November 28th, 1906. Also as to the liability of the City for architect's fees claimed by Mr. A. F. Heide for plans for the Park School, Mr. Heide also having been appointed by virtue of the above resolution of the Board of Supervisors.

You also request advice as to the contention which has been made that the provision of Resolution No. 4073 (New Series) of the Board of Supervisors under which Mr. Mooser, an architect, also appointed by reason of said Resolution No. 565, was paid \$7500 in settlement of his claim for plans for hospital buildings, which said Resolution No. 4073 recites "said William Mooser shall release the City and County of San Francisco from any obligation to pay any claim for architect's services in the matter of the preparation of plans and specifications for the South End School" in consideration of such payment of \$7500. Mr. Mooser's appointment as architect for the South End School was also under said Resolution No. 565 and it is claimed that this language in Resolution No. 4073 is a recognition by the Board of Supervisors that an obligation to pay

did exist and that this recognition may affect the liability of the City to pay Mr. Lyon and Mr. Heide as above described.

You also request advice as to the status of the various actions which have been instituted in the Courts by the various architects appointed by reason of Resolution No. 565, for the recovery of their claims.

Opinion:

Ordinance No. 1767 of the Board of Supervisors, approved March 12th, 1906, outlines a general plan for the construction of all public buildings to be erected from the proceeds of municipal bonds, providing that whenever the proper Board shall determine that it is necessary that a public building or buildings should be erected for such Board it shall declare the necessity for such building or buildings in writing and transmit a copy thereof to the Board of Supervisors. Upon receipt thereof the Board of Supervisors shall, if such construction is deemed necessary, direct the Board of Public Works to make and furnish plans for such construction. Then follows in detail the manner of procedure to be adopted by the Board of Public Works in the preparation and selection of such plans, a competitive submission of plans by architects being provided. Thereafter the plans are to be transmitted to the Board requesting the construction, for its final approval. When such plans have been fully approved they shall be submitted to the Board of Supervisors, whereupon the necessary appropriation shall be made for the construction and the Board of Public Works shall be authorized to advertise for bids for the construction of the building in accordance with the plans selected. Upon the selection of the plans the successful architect is to be appointed by the Board of Public Works, the consulting architect for the construction of the building at a compensation equal to 3% of the whole cost of the building.

We may, for the purposes of this opinion, concede that said Ordinance No. 1767 of the Board of Supervisors is valid, as it is not necessary, for the purposes of advising you as requested, to go into consideration of the validity of that Ordinance. It

is to be borne in mind that the Charter of the City and County of San Francisco outlines completely the necessary procedure in the matter of the building of school houses.

1. The Board of Education is required to make requisition upon the Board of Public Works for plans, specifications and estimates. (Art. VII, Chap. VI, Sec. 1)

2. "The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors, of the supervision of any and all building construction in the City and County; of the construction of any and all public buildings and structures, under plans duly approved by the various departments, including all school houses and fire department buildings, and the repair and maintenance of any and all buildings and structures owned by the City and County." (Art. VI, Chap. I, Sec. 9, Paragraphs 5 and 6).

Section 10. "All plans and estimates required by the Supervisors in connection with any public improvements or utilities shall be made by the Board of Public Works and it shall, when requested to do so, furnish information and data for the use of the Supervisors."

3. " * * The Board may employ such clerks, superintendents, inspectors, * * * architects and workmen as shall be necessary for the proper discharge of their duties under this Article, and fix their compensation; but no compensation of any of said persons shall be greater than is paid in the case of similar employments." (Art. VI, Chap. I, Sec. 3.)

4. These plans having been made, they must be approved by the Board of Education and "endorsed 'approved', with the date of such approval, by the President and Secretary thereof, and returned to the Board of Public Works, which shall proceed without delay to have such school house constructed and completed in accordance therewith. When such school house is completed the Board of Public Works shall notify the Board of Education to examine the same, and

if it has been built in accordance with the plans and specifications and with the estimated cost thereof, the Board of Education shall accept and take possession of it." (Art. VII, Chap. VI, Sec. 1)

Granting that said Ordinance No. 1767 is valid, it is very clear that the amendment to this Ordinance No. 49 (New Series) approved August 28th, 1906, under which amendment the appointment of the architects, as above described, was authorized, is clearly void. This amendment added a new section to Ordinance No. 1767 known as Section 16-A, which provides that "whenever it shall appear to the board, commission or officer which may have requested the construction of the aforesaid buildings, that it is inexpedient and not for the best interests of the City and County of San Francisco or impossible to secure such suggestions and designs for plans the Board of Supervisors, on request of such board, commission or officer, shall select and appoint an architect or architects to perform the necessary suggestions and designs for plans for the construction of the aforesaid buildings, without calling for competitive submissions."

It was under this amendment that Resolution No. 565 (New Series), appointing Mr. Lyon and Mr. Heide and several other architects was made. This amendment is void because, as indicated in the above described charter proceedings, under "2" and "3" this power of appointing architects is vested by the charter exclusively in the Board of Public Works, and the Board is required to act under such ordinance as may be passed by the Board of Supervisors.

Ordinance No. 1767, which we assume to be valid, gave this power to the Board of Public Works on competition of architects and the amendment (Ordinance No. 49) adding Section 16-"A" is void, as it gives the sole power of appointment to the Board of Supervisors. The charter having given this power to the Board of Public Works, and the ordinance of the Supervisors, No. 1767, having carried that policy of the charter into effect, it is impossible to take this power from the Board of Public Works and give it to the Board of Supervisors.

ors. It has been repeatedly held by the Courts that the powers of such bodies as the Board of Supervisors, or any other city boards or officials are measured most strictly by the mode set forth in the charter.

With reference to the contention that the act of the Board of Supervisors in passing Resolution No. 4073 was a recognition by the Board that an obligation to pay these architect's fees did exist, it is just as far beyond the powers of the Board of Supervisors to recognize any obligation such as this and thereby bind the City as it was in the first place for the Board to bind the City as they attempted to do by the passage of Resolution No. 565.

When the Charter measures the power of the Board of Supervisors or of any other City board or official, that board or official cannot act without and beyond those powers, and then subsequently ratify by any action whatever the original void act. If this were possible it is easily seen that all a board or official would have to do would be to exceed its or his powers and then subsequently ratify its or his action and claim that this rendered the City liable, which of course would be defeating the very purposes of the charter enactments.

As to the status of the various actions brought by architects in the matter of these claims, a demurrer has been filed by this office in the case of *Edelman v. City and County*, No. 21949, and the views above expressed will be set forth for the consideration of Judge Seawell, in whose department this case is pending.

The action brought by William Mooser has been by him dismissed, his claim having been settled, as you indicate, in Resolution No. 4073 of the Board of Supervisors.

Mr. Lyon brought an action against the City entitled *M. J. Lyon v. City and County of San Francisco*, No. 21387. The City's demurrer was sustained on February 26th, 1909, with leave given to amend and Mr. Lyon's attorney has been requesting and receiving stipulations extending his time to amend since the said ruling of the Court.

I advise you that the City is not legally liable by reason of

Resolution No. 565 to pay the claims of Mr. Lyon or Mr. Heide,
as described in your communication.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Procedure in Having Indigent Person Returned to Another
County From Which He Came.**

March 22nd, 1910.

Gentlemen: I am in receipt of your communication of
March 10, 1910, as follows:

“Please be advised that at a meeting of the Board of Health
held on March 8th, a resolution was adopted referring the
following communication received from the Superintendent of
the Relief Home for Aged and Infirm, to your office for proper
attention.

‘On the 17th of February we received an inmate named
Margaret Sullivan. This woman is partly demented, and on
going into her case I find that she arrived from the East some
time since at Red Bluff. That she lived on the County for
seven weeks, and at the end of that time was given ten dollars
and a ticket to San Francisco by the Sheriff of Tehama County.
The State law prohibits anything of this kind, and I would
recommend that the matter be called to the attention of the
City Attorney, with instructions to proceed in a legal manner
for returning this woman to Red Bluff, and also to collect
for the expense the City and County of San Francisco have
incurred during the time she has been here.’ ”

Opinion:

The Legislature of the State of California enacted a statute,
approved March 23, 1901, entitled “An act to provide for the

maintenance and support, in certain cases, of indigent, incompetent, and incapacitated persons (other than persons adjudged insane and confined within state hospitals), becoming a public charge upon the counties or cities and counties within the State of California, and for the payment thereof into a fund for the maintenance and support of such persons."

Section 4 of said Act is as follows:

"If any person shall become chargeable as a pauper, or poor, or indigent, or incapacitated, or incompetent person as herein designated, in any county, or city and county, who did not reside therein (as herein specified) at the commencement of three months immediately preceding his becoming so chargeable, but did at that time reside (as herein specified) in some other county, or city and county in this state, it shall be the duty of the county clerk of said first mentioned county or city and county to send written notice by mail or otherwise to the county clerk of the county or city and county in which such person so resided, requesting the proper authorities of such county or city and county to remove such person forthwith, and to pay the expenses accruing or to accrue, in taking care of such person; and such county or city and county, wherein such person resided at the commencement of the three months immediately preceding such person's becoming chargeable as a poor, indigent, or incapacitated, or incompetent person as herein designated, shall pay to the county or city and county so taking care of such person all reasonable charges for the same, and such amount may be recovered by suit in any court of competent jurisdiction by such county or city and county."

I advise that a communication be sent by you to the County Clerk of this City and County setting forth the facts in the above matter and calling his attention to the provisions of Section 4 of the Act above mentioned.

In the event that the authorities of Tehama County fail to remove said indigent person and reimburse the City and County of San Francisco for the expense incurred in the matter, I will then be in a position to take action and institute

proceedings for the recovery of the money expended by this City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

**Powers of Board of Public Works in Considering Protests
Against Construction of a Sewer.**

March 22nd, 1910.

Gentlemen: I am in receipt of your communication of March 17, 1910, as follows:

"The Board of Public Works represents as follows: On October 4, 1909, Harry Easom petitioned for the construction of a sewer in Rutledge Street, between Peralta and Alabama Streets. Upon investigation by the City Engineer, the Board of Public Works inaugurated public proceedings for the construction of this sewer, Resolution of Expediency No. 1046, second series, and Resolution of Intention No. 2313, second series, being duly adopted. Several property owners filed objections with this Board, stating that they had an easement over certain private property for the necessary sewage. There is herewith forwarded to you for your information the original petition and the protest against the doing of this work, and Mr. Marion Veeki, Attorney at Law, will consult you tomorrow, and submit certain deeds relating thereto.

This Board desires to be advised whether or not the public proceedings can be continued."

It appears from the above communication that the only question involved is whether or not the public proceedings therein mentioned can be continued, you are advised as follows:

Opinion.

The records and papers accompanying your request disclose the fact that there is at the present time a private sewer maintained under and across the land of the person who filed the petition for the construction of the sewer, and that he disputes the right of the people served by said sewer to maintain the same on his land. Upon that dispute between said parties and the rights and liabilities of the several parties thereto, this office can render no opinion or advice, not having the power to investigate a pure matter of fact for the reason that I am not empowered to compel the attendance of witnesses or administer oaths.

It also appears that the persons served by said private sewer filed with the Secretary of the Board of Public Works on February 5, 1910, a protest against the construction of the sewer on Rutledge Street. Nothing appearing to the contrary and considering the fact that your Honorable Board has recognized the said protest, I will assume that it was signed by the owners of a majority of the frontage of the property fronting on said work and was filed within the time limited by the Charter for the filing of such protests.

In all classes of street improvement work other than the construction of sewers, manholes, culverts, drains, cesspools, catch basins or of storm water inlets, or work on sidewalks, street crossings or intersections such a protest, automatically delays proceedings for six months, unless the protestants shall meanwhile petition for the work to be done, and at the expiration of said six months the proceedings shall continue if the Board shall deem proper.

In the case presented here, the Charter, Section 4, Chapter II, Article VI, provides that the Board shall fix a time for the hearing of the objections and proceed to hear and pass upon the same; and the Board has the power either to sustain or overrule said objections and its decision in that respect is final and conclusive.

Section 2, Chapter IV, Article VI, of the Charter, gives the Board of Public Works the power to prescribe the loca-

tion, form and material to be used in the construction, reconstruction and repairing of * * * every private drain or sewer emptying into a public sewer and to determine the place and manner of the connection. Under that power the Board, in this case, may determine whether or not said private sewer is in good condition and, if necessary compel the owners thereof to make proper repairs in the same.

In case the Board finds that said private sewer is sufficient for the purpose for which it is used, then the Board, in its discretion, may sustain the objections presented by the protestants and discontinue the proceedings before it, leaving the question as to the right to maintain said private sewer across the land of the petitioner Easom, to the Courts for decision. If the Courts should finally decide that the protestants have no right to an easement upon or across said land, then the Board, upon the presentation of a proper petition, may continue with the construction of said sewer, according to the provisions of Section 4, Chapter II, Article VI, cited above, relating to the consideration by the Board of objections against the construction of sewers.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

A Member of Fire Department who Resigns Under Coercion, After Having Been Assured by Fire Commissioners that He Would Be Given a Leave of Absence, Which Assurance Led to His Entering into Contracts that Prevented for a Time His Continuation in the Department, Is Entitled to Disaffirm His Resignation and Reinstatement.

March 23d, 1910.

Gentlemen: I am in receipt of your communication as follows:

“This Board respectfully submits the attached copy of a

request from Thomas G. Howe, for re-instatement in this Department, with the request that you furnish it with an opinion as to whether this Board has the power of reinstating Howe as a member of the Department or not, providing the facts in this case are as he sets forth in his said communication.

The copy of petition of Mr. Howe states the following facts:

“My name is Thomas G. Howe. At the present time I reside at 1325 Hampshire Street, San Francisco. I am married and have one child.

I entered the Fire Department January 15, 1905 as hosemen. I was appointed to Relief Company 6 and afterwards detailed to Engine 31. This latter appointment lasted until May 14, 1906.

After the fire and earthquake, as I am informed, the Board of Supervisors passed a resolution requesting the Fire and Police Departments to reduce their expenditures as much as possible on account of shortage of money in those respective funds; in conformity with this resolution of the Board of Supervisors the Chief of the Fire Department, as I am informed, communicated to the various captains in the fire department the fact that it was desired to use the money which was available for the payment of salaries in payment of those men who were unable to earn a livelihood for themselves or their families in any way except through their positions in the fire department and if there were any men who could earn a living approximately as good as they did at the Fire Department, or had some outside occupation, that such men would be granted a leave of absence from the department without pay for a year or two years if desired. This information was communicated to me by Captain Thomas Canty, Commander of my company.

I was a boilermaker by trade and I determined to see, after consultation with my wife, whether or not I could obtain occupation that would support my family outside of the department, so as to permit the salary that would otherwise be paid to me to be paid to those that had no other source of income. Accordingly, as an experiment, I applied for, and received, a

leave of absence for three months from the department and shortly thereafter secured employment at my trade in the Risdon Iron Works. I worked in the Risdon Iron Works about six weeks and then went to work for the Moore & Scott Boiler Works and worked there also for about six weeks, when I obtained employment to assist in the installation of a pipe line for the Northern California Power Co. at Volta, Shasta County, California. Before leaving San Francisco for Volta, I applied for and received, through my Captain, Canty, to the Board of Fire Commissioners for the extension of my leave of absence from three months to one year. I could have applied for and doubtless have received, at this time, an extension of my leave for two years instead of one, but I thought it best, at the time, to take a year's leave, believing that I had the privilege, as a matter of right, of extending it another year should my business affairs require such an extension. When the year of my leave was about to expire, in July 1907, I was in a very embarrassing position financially. I had, together with my partner, Wm. A. Finley, started a boiler shop at Redding, at the request of the Northern Power Company, the Power Company having agreed, as we understood it, to give us all the work they had in our line. This shop was opened in May, 1907. I had every cent I possessed in the world in the business, and I did not know which way to turn or what to do. I received a notice, shortly prior to the 1st of July, from the Fire Department requiring me to report for duty on the 1st of July. I wrote setting forth the circumstances in which I was placed and the condition in which I found myself and applied for another year's leave of absence, as I had presumed I would have the right to do."

In reply to this above communication, petitioner states that he received a notice from the Chairman of the Fire Commission stating to petitioner:

"That if I had invested in business in San Francisco that something might be done for me, in the extension of my leave, but as long as I had seen fit to take the business away from San Francisco, that nothing could be done for me and that I must

either resign or take the consequences of being broke. Sooner than be broke by the Department, I tendered my resignation which was accepted.

These are in brief the circumstances under which my resignation from the Department was obtained.

I am 33 years of age; have never had any trouble in the Department or any charges filed against me nor have I received a reprimand.

So far as my efficiency as a member of the Department is concerned and my general conduct as such a member, I feel that I can refer to Captain O'Brien of Engine 31, and also to Captain Canty, now retired, who was, during a portion of my service in the Department, Captain of the Company to which I was attached.

I have the honor to hereby apply for reinstatement as a member of the San Francisco Fire Department, upon passing the necessary physical examination, and complying with such regulations as may be proper in my case.

I further desire to state that in the event of my reinstatement or my being permitted to withdraw my resignation given under the circumstances that I have related, I hereby waive all and every claim to salary or any claim to pension that may have arisen in any way whatsoever during the time of my absence from the Fire Department."

Note:—I understand that throughout petitioner's employment in the Fire Department from January 15th, 1905, to the time he was granted a leave of absence—he was a regular permanent Civil Service employee of the Department.

Opinion.

I was asked in 1908 by the Board of Police Commissioners to advise said Board as to their power to reinstate a member of the Police Department whose case was practically the same as that of your petitioner. I rendered an opinion to the Police Commissioners on July 23, 1908, holding from the facts before me, that the petitioner in that case, Frank W. Esola, had really

resigned as a result of coercion, and that for that reason the Police Commission should reinstate him in the Department.

I copy from the opinion as follows:

"The petition referred to recites that Frank Esola was on the 10th day of April, 1897, and now is, a resident of the City and County of San Francisco. That on the 10th day of April, 1897, he was appointed a regular police officer of the City and County of San Francisco and remained continuously in such service, as such police officer, for nine years and eleven months."

Then follows a statement as to the members of the Police Department, after the fire of 1906, who had trades, etc., being requested to resign on leave of absence, practically the same as is set forth by your petitioner to have been done in the Fire Department.

"That acting upon such suggestion the petitioner made arrangements to play ball with the San Francisco Ball Team, and upon the Chief of Police and the President of the Board of Police Commissioners and one other member of the Commission stating that he would be granted leave of absence for a year without pay he signed a contract for one year, to play ball with the San Francisco Base Ball Team. That subsequent to the signing of such contract he made application for leave of absence which was denied. That the management of the San Francisco Base Ball Team refused to release the petitioner from his contract and that he unwillingly tendered his resignation as a police officer, which resignation was subsequently accepted by the Commissioners. That had not the petitioner received the assurances regarding his leave of absence that he did, from the Chief and from the President of the Commission and one other member, he would never have entered, into a contract with the San Francisco Base Ball Team. And that had not the petitioner been bound by this contract he would never have resigned his position as a police officer. * * *

"Ordinarily a resignation from the public service after acceptance constitutes a complete severance of the official rela-

tion existing between the person resigning and the public service. But the conditions existing subsequent to April 18, 1906, were so abnormal that we are justified in carefully investigating the circumstances under which resignations were secured and acted upon by the various departments. It is a fact well known to the community that the various City Departments were sadly crippled at that time and that it was feared there would be a wholesale reduction, for a time at least, of the administrative forces of the City government. As a matter of fact many City employees were forced to waive a portion of their salaries in order that the various funds might not be depleted. Such being the case it would seem that the conditions under which the petitioner severed his relations with the Police Department, differed from those surrounding the ordinary resignations.

“This being so, we are called upon to ascertain the powers of the Police Commission. So far as this particular case is concerned the Charter is silent and so far as I am able to ascertain there is no expression of law, nor any decision in this State, that will aid in arriving at a conclusion. The only case that I have been able to find touching this subject is one involving the application of John W. Goodman for restoration to duty in the Police Department of the City of New York.”

The case of the people ex rel Goodman vs. Voorhies, 66 Hun., 88, is then cited, which decided that where the facts were that a policeman had resigned under coercion, that such a resignation is not valid, and that the proper method to obtain redress was to apply to the Board of Police Commissioners to reconsider its action and to reinstate the petitioner.

Referring to the petition which is now before your Commission, it will be noted that it is set forth that petitioner, at the time of withdrawing from active work in the Department, was assured by the Captain of his company, speaking for the Chief of the Fire Department, that if he would withdraw from the Department he “*would be granted a leave of absence from the Department for a year or two years if desired.*”

Acting on this assurance petitioner applied for a leave of absence from the Department, for three months only—evidently acting cautiously so as to be sure to secure employment before applying for an extended leave of absence. At the end of this three months, having obtained permanent employment, to assist in the installation of the pipe line for the Northern California Power Company at Volta, Shasta County, California, he applied for and received an extension of his leave of absence for one year. And he goes on to state:

“I could have applied for and doubtless have received, at this time, an extension of my leave for two years instead of one, but I thought it best, at the time, to take a year’s leave, believing that I had the privilege, as a matter of right, of extending it another year should my business affairs require such an extension.”

If your Board should find the facts to be that, acting upon this assurance of the Chief of the Fire Department, (who was acting for the Fire Commissioners, the body with power to grant leaves of absences), petitioner was led to believe that he could have his leave of absence extended for at least two years, and, acting upon this assurance and because of this assurance, had become so involved in business relations as to “invest every cent he had in the world in the business,” which would have entailed a great loss if he gave up this business at the end of the year’s leave of absence; if you further find that he resigned from the Department only because he could not withdraw from his business without a heavy loss, and because he didn’t want the disgrace of a dismissal from the Department which had refused a renewal of his leave of absence, it would seem very clear, both under the law and from principles of ordinary justice, that the petitioner is entitled to relief from such a forced resignation.

I have no facts before me as to how long after petitioner’s resignation from the Department, it was necessary for him to remain with his business in order to protect himself. If you should find that he remained no longer than was necessary to accomplish this object, and then, within a reasonable time

thereafter made application for reinstatement, in the Department, this would be an additional reason why the petition in this matter should be granted.

The reasons suggested that if he had invested in business in San Francisco, he would be in a more favorable position, cannot be sustained. If the facts are found by you as above indicated, it would appear that, in seeking such employment as he did, in Shasta County, he was in fact doing his best at a time when conditions were very unsettled, to relieve the City from the responsibility of continuing him on its payroll; and this, at the request of his superiors in the Department, and in order to help some man not so fortunate as himself in the ability to earn a living out of the Department.

The City should, under the circumstances, remember such facts as are above set forth, if they be shown to exist, and it is indeed fortunate that the law is not such as to prevent the City from doing common justice to a member of the Fire Department who had, in good faith, relied upon the assurances given him by his Superior Officers, that his leave of absence would be extended to two years if he found it necessary to apply for such an extension. This opinion is intended to apply only to such an extraordinary case as would above appear to have existed after the great fire of 1906.

I therefore advise you that if you should find the facts as above indicated, petitioner would be entitled to disaffirm his resignation, and to be reinstated in the Fire Department.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

**Required Circulation for the Official Newspaper Refers to
Circulation as of the Time of Bidding for the Printing
Contract.**

March 24th, 1910.

Gentlemen: I am in receipt of a request for an opinion sent to me by the Clerk of the Board of Supervisors, which reads as follows:

"I am directed by the Printing Committee of the Board of Supervisors to request an opinion from you as to the construction of Section 2, Chapter III, Article II, of the Charter, which reads in part as follows:

'All contracts for official advertising shall be let annually 'in like manner by the Supervisors to the lowest responsible 'bidder publishing a daily newspaper in the City and County 'which has a bona fide daily circulation of at least eight thousand copies.' * * *

The question the Committee desires information upon is whether a bid stating that it will have a circulation of that number, if it secures the official advertising, is in compliance with the intent of that section, or whether the bidder must have, without securing the official advertising, a daily publication of eight thousand."

On February 23rd, 1900, former City Attorney Lane advised the Board of Supervisors upon this point in the following language:

"The Charter does not limit the competition to newspapers which have had such circulation for two years or for any other period whatever, but simply prescribes that at the time of bidding the newspaper must have the circulation named."

I am of the opinion that the above quoted portion of the opinion of former City Attorney Lane correctly states the law, and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Printing Committee,
Board of Supervisors.

Peddlers in the Streets—Control Over.

March 28th, 1910.

Sir: In reply to your request under date of March 16th, 1910, asking to be advised "whether the Mayor is privileged or required, under the law, to issue permits to fruit peddlers or other venders, to maintain wagons in the streets" also asking to be advised "as to the law covering the presence of such vendors in the streets and which department has jurisdiction over the same," I submit the following:

The Mayor is not required under any existing Ordinance to issue permits to fruit peddlers or other vendors to maintain wagons on the streets, nor is there any Ordinance or law granting to him the privilege of so doing; and a permit granted as a privilege would be beyond the power of the Mayor and could have no force in law.

Streets are primarily for the use of traffic and the presence of vendors thereupon is as lawful as is the presence of any other person as long as they observe the provisions of Ordinance No. 649 (New Series), approved January 15, 1909, together with whatever police regulations are necessary for its enforcement. Nothing herein, however, must be interpreted as meaning that peddlers or vendors have the right to occupy any particular or designated stand in the streets, as there exists no authority in any department of the City government to grant such a privilege; and it must remain so until the Board of Supervisors pass some Ordinance providing for the granting and regulating of such a use of the streets.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

**United R. R. Can be Compelled to Run Sutter Street Cars
Down Inside Tracks on Lower Market Street.**

March 26th, 1910.

Gentlemen: I am in receipt of a request for an opinion sent to me by the Clerk of your Board, which reads as follows:

"I am instructed by the Public Utilities Committee of the Board of Supervisors to refer to you proposed Ordinance directing the United Railroads of San Francisco to run its Sutter Street cars, along the inside tracks on lower Market Street from Sansome Street to the Ferries, with the request that you advise said Committee whether or not it is within the power of the Board of Supervisors to enact such an ordinance. If you find that it is within the power of said Board, request is made that you see that the proposed ordinance is in such form as to make it legally sufficient and effective."

As to the power of the Board:

I find at the present time street railway tracks along and upon Sutter Street from Central Avenue east to Market Street and thence along Market Street to the City Front. These tracks were laid under a franchise granted to the Sutter Street Railroad Company in 1879 by order of the Board of Supervisors of San Francisco, being Order No. 1525. It is to this order that the rights of the Sutter Street Railroad Company must be traced.

The Sutter Street Railroad Company transferred all of its franchises to the Sutter Street Railway Company, which in turn transferred a part of the franchise thus acquired by it to the United Railroads of San Francisco. The part transferred to the United Railroads of San Francisco is that part extending along Sutter Street from Central Avenue to Market Street. The remainder of the franchise is still in the Sutter Street Railway Company.

As to the power of the Sutter Street Railroad Company thus to divide or even transfer its franchise I at this time express no opinion.

The United Railroads of San Francisco in addition to maintaining its Sutter Street service also maintains a track and operates a street railway down Market Street from Sutter Street east. The intention of the ordinance, according to the language of your request, is to provide that the United Railroads must run its Sutter Street cars down Sutter Street and by means of a switch turn into and continue down Market Street upon the inside tracks. This I believe your Honorable Board has the right to do.

The franchise of the Sutter Street Railroad Company, above referred to, gave to the Sutter Street Railway Company a right to run cars over the following streets: Commencing at the City Front on Market Street; thence along Market Street to Sutter Street; thence along Sutter Street to Central Avenue. A franchise such as this is an entirety. The intention of the legislators in granting it was to provide a car service from Central Avenue to the City Front.

It is to be noted furthermore that the order granting this franchise does not provide upon what part of the street the tracks of the Sutter Street Railroad Company are to be laid, except in so far as that location is determined by the reference in Order No. 1525 to Section No. 498 of the Civil Code. Section No. 498 of the Civil Code provides that the tracks must be constructed as nearly as possible in the middle of the street. The only location for the tracks, therefore, specified by Order No. 1525 is that they shall be as near the middle of the street as possible. Order No. 1525 provides, therefore, for the running of cars down Sutter Street to the Ferries as near the center of the street as possible. To compel the running of the Sutter Street cars down Market Street on the inside tracks to the City Front is not in violation of Order No. 1525, but in furtherance of it.

The Legislature of the State of California has expressly given to the municipality power to thus insist upon the carrying out of a franchise. Section 503 of the Civil Code of the State of California reads as follows:

“Cities and towns in or through which street railroads run may make such further regulations for the government of such street railroads as may be necessary to a full enjoyment of the franchise and the enforcement of the conditions provided herein.”

This section, I believe, is intended to give to cities and towns the right to make regulations necessary to a full enjoyment of the franchise by the public.

The fact that the United Railroads of San Francisco is being compelled to run the Sutter Street cars beyond the point that it is now running them, I believe is not an objection to the ordinance.

If the Sutter Street Railway Company had continued to be the owner of the tracks upon Sutter Street west of Market, it could, under Order No. 1525 and Section No. 503 of the Civil Code, have been compelled to carry out the full terms of the franchise and run its cars to the City Front. Naturally the United Railroads of San Francisco can stand in no better position than its assignor. The public cannot be deprived of its right to insist upon a full performance of the franchise by a transfer of a part of such franchise to another than the original holder.

The same reasoning will apply to the Sutter Street Railway Company. In running the Sutter Street cars into Market Street it may be necessary for a slight distance to use the track now claimed by the Sutter Street Railway Company. If so, I do not think the Sutter Street Railway Company is in a position to object. The portion of the franchise retained by it is still subject to the right of the public to insist upon the performance of the full franchise of which said portion retained by it is only a part.

As to the Form of the Ordinance.

Your ordinance, however, fails to give to the United Railroads of San Francisco the right to string wires over the switches or turn-outs that may be necessary in order for the Sutter Street cars to be run from the end of the wires of

the United Railroads of San Francisco on Sutter Street to those over the inside tracks on Market Street. I believe your Honorable Board has the right as an incident necessary to bring about the full enjoyment by the public of the franchise granted by Order No. 1525 to order the stringing of such wires. Unless such provision is made in this ordinance the United Railroads of San Francisco, I believe, could refuse to comply with the order to run its cars down Market Street upon the inside tracks.

As to the reasonableness of the time within which the United Railroads of San Francisco is compelled to comply with the ordinance I give no opinion. The reasonableness of such time is a question of fact to be determined by your Honorable Board.

Respectfully,

PERCY V. LONG,
City Attorney.

Public Utilities Committee,
Board of Supervisors.

**Forfeiture of United R. R. Franchise Presidio Ave., Between
Jackson and California.**

April 1st, 1910.

Gentlemen: I am in receipt of a request for an opinion sent by the Clerk of your Board, which reads as follows:

“Your attention is hereby called to Resolution No. 5554 (New Series) of the Board of Supervisors, passed March 21, 1910, wherein and whereby you are requested to investigate by what authority the United Railroads is proceeding to lay railroads tracks and erect poles and wires on Presidio Avenue, between Jackson and California Streets, and, in the event of your finding that such construction is without warrant in law, to institute proceedings to restrain the same.”

In reply thereto I would state that upon examination I find that the right to lay tracks upon Presidio Avenue, between Jackson and California Streets, was given by the Board of Supervisors of the City and County of San Francisco under and in accordance with Order No. 1936, passed on the 27th day of December, 1887, which said right or franchise, I am informed, was subsequently assigned and is now in the hands of the United Railroads Company of San Francisco.

Under this order tracks were laid upon said street, but said tracks have not been used since the 18th day of April, 1906. In fact, from an examination made through this office, I find that the tracks where they cross Clay Street are covered with asphalt.

Furthermore, from a request for an opinion forwarded to this office from the Department of Public Works, I find that a permit to tear up the street and lay railroad tracks or erect poles and wires on Presidio Avenue, between Jackson and California Streets, has not been granted by said Department of Public Works. The work on said streets accordingly was stopped by said Department. In my opinion, therefore, the following conclusions follow from the above facts:

1. Without such permit, under the Charter, the United Railroads has not the right to proceed to lay railroad tracks or erect poles or wires on Presidio Avenue, between Jackson and California Streets.

2. Inasmuch as the work has been stopped, there is nothing to restrain at the present time.

3. The failure to use said tracks for the period since 1906 is sufficient ground upon which to base a forfeiture of the franchise to lay tracks and run a street car upon said streets, but such forfeiture can only be accomplished through legal procedure.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Board of Works Has Power to Grant Permit to United R. R.
to Reconstruct Curves and Tracks.**

April 1st, 1910.

Gentlemen: I am in receipt of a request for an opinion from your Board dated March 21st, 1910, which reads as follows, to-wit:

“The Board of Public Works respectfully requests that it be advised as to whether or not it can grant a permit to the United Railroads to reconstruct curves and tracks on Presidio Avenue, commencing at the intersection of Presidio Avenue and Jackson Street.”

In reply thereto would state that the Board of Public Works, under the Charter, has the right to grant permission to reconstruct curves and tracks on Presidio Avenue and Jackson Street.

I think it proper, however, to advise you that I have this day advised the Board of Supervisors, in response to a request of theirs, as to the status of the tracks and curves on Presidio Avenue commencing at the intersection of Presidio Avenue and Jackson Street and for your convenience I enclose you a copy of my opinion.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Board of Works has no Power to Grant Permit to String
Wires on Poles for Transmission of Electric Power.**

April 8th, 1910.

Gentlemen: You ask to be advised whether your Board has power to grant the petition of the Sierra and San Francisco Power Company for permission to erect poles for the

purpose of conducting electricity for light, heat and power purposes over and along certain designated streets in the City and County.

Subdivision I of Section IX of Chapter I of Article VI of the Charter provides that the Board of Public Works shall have exclusive authority, in conformity with the ordinances of the Board of Supervisors, to prescribe rules and grant permits for

“The erection of telegraph and telephone poles, and poles for electric lighting, and the laying under the surface of the streets or sidewalks of telegraph and telephone wires, and wires for electric lighting and power.”

Order No. 214, approved August 23, 1899, establishes “underground districts” and provides that within three of the designated districts all electric wires must be placed underground and that in other districts they may be run on poles.

Ordinance No. 1564, approved July 27, 1905, prescribes conditions under which the Board of Public Works may grant permits for the maintenance of power and electric wires and requires the approval of the Chief of the Department of Electricity.

Ordinance No. 621, approved January 12th, 1903, prescribes safety regulations for the maintenance of electric wires and applies to wires maintained by the City and County for municipal business as well as to those used for private purposes.

Order No. 214, was adopted prior to the Charter and in so far as it is in conflict with the provisions of the Charter above quoted it is repealed by the adoption of the Charter. We may, therefore, take it for granted that there are no “underground districts” for the running of electric power wires and we must necessarily look to the Charter for the expression of the powers of your Board in regard to the granting of permits.

The section of the Charter above quoted provides that your Board may grant permits for the **“laying under the sur-**

face of the streets or sidewalks of * * * wires for electric lighting and power" and contains no power to grant permits for wires above the ground for these purposes. This is the measure of the power of your Board. You must act in conformity with the ordinances of the Board of Supervisors but it is not competent for that Board to add to or alter the express powers bestowed upon your Board by the charter. In other words, the bestowal of power as contained in this Section of the Charter must be taken as a denial of others not therein enumerated upon the well known rule of interpretation "*expressio unius est exclusio alterius*."

The foregoing views are based upon the assumption that the petitioner has obtained the necessary franchise to use the streets for power purposes under the limitation of Section 7 of Chapter II of Article II of the Charter. This section is not inconsistent with the Act of March 22, 1905, (Stats. 1905, p 777), which requires a franchise from the "legislative body of the county, city, or city and county" to "erect poles or wires for transmitting electric heat and power along or upon any public street." It is not necessary here to determine whether the granting of such franchises is a "municipal affair", as a franchise is required both by the Charter and by the general law.

Both the charter and the statute must be read in connection with Section 19 of Article XI of the Constitution, which provides that in any city where there are no municipal works owned, any company may have the privilege of using the streets and of laying down pipes and conduits therein for the purpose of "**supplying such city and its inhabitants either with gas light or other illuminating light.**"

This constitutional provision is in effect a statutory grant of franchises to all persons who come within its provisions and admits the inherent power of the city to grant or require a franchise from persons engaged in the business therein enumerated. As such it must be taken as a specific limitation upon this inherent power and so must be strictly construed. That is to say, it must be taken as a grant for the purposes

therein enumerated and for no other. Such being the case, the provisions of the Charter or Statute, so far as they apply to franchises for power purposes, must control the actions of the Board of Supervisors, and consequently control your actions as pointed out above.

The petition does not show that the permit is sought for the purposes of supplying light to the "City and County and its inhabitants," but, if such is found to be the fact, your Board may grant the permit in conformity with the views herein expressed. If, however, the permit is sought for the purpose of transmitting electricity for heat or power in addition to lighting, then the petitioner must first secure a franchise from the Board of Supervisors.

The foregoing views are not changed by the fact that the three purposes are all grouped under one petition. In any event, your powers are limited to the granting of permits for underground conduits when the wires are to be used for power purposes.

You are therefore advised that, under the circumstances, you have no power to grant the permit requested in the petition mentioned.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Pension Act of 1889 is Superseded by Charter and Widow of Police Sergeant who Died After Adoption of Charter Cannot Rely upon the Earlier Act.

April 8th, 1910.

Gentlemen: I am in receipt of yours of the 5th inst., in which you request an opinion as follows:

"Mrs. Rebecca Cohn, widow of Edward Cohn, a retired Sergeant of Police, has made application to the Board of

Police Relief and Pension Fund Commissioners for the sum of \$1,000 by virtue of the law existing at the time of his retirement from the Police Department on the 31st day of July, 1895.

We beg to call your attention to the following facts in connection with the matter: Cohn was appointed a member of the Police Department on February 1, 1868; was retired and relieved from service on July 31, 1895, and died on November 3, 1909, receiving a pension continuously from the 31st day of July, 1895, up to the time of his death, November 3, 1909."

You also enclose brief submitted by counsel for petitioner, citing the case of Kavanaugh vs. Board of Police Commissioners (134 Cal., p. 50), and the Statute of 1891 (Stats. 1891, page 287), which statute, it is claimed, was passed to overcome the decision of the Supreme Court in Pennie vs. Reis, referred to below.

Opinion.

The act of the Legislature of 1889, (Stats. 1889 pg. 56), upon which petitioner relies has been superseded by the Sections of the Charter of this City and County, Art. VIII, Chap. X, which provide an entirely new pension scheme for the Police Department of this City and County to take the place of that formerly provided by the Act of 1889, and inasmuch as the husband of petitioner died in 1909, subsequent to the adoption of the Charter, petitioner can have no claim against the Police Relief and Pension Fund on account of the Statute of 1889. There is nothing in the Charter authorizing any payment to petitioner upon the facts stated in your request for an opinion. These views were upheld by Judge Seawell, who in April, 1909, sustained the demurrer filed in the case of Mary Baldwin vs. Board of Police Commissioners, No. 20,444, in which case plaintiff claimed the sum of one thousand dollars under the Act of 1889, as the unmarried sister of a deceased policeman who died in the year 1908. The reasoning supporting these views has been supported in the following cases:

Pennie vs. Reis, (80 Cal. 266; also decided in U. S. Supreme Court in case of same title reported in 132 U. S., p. 471.)

Clark vs. Reis, 87 Cal., 543.

With reference to the case relied upon by petitioner of *Kavanaugh vs. Board of Police Commissioners*, 134 Cal., 50, a reading of that case will show *Kavanaugh*, a Police Officer, died **before the adoption of the Charter** and therefore, of course, his widow had a vested right in the pension fund which could not be affected by the adoption of the City Charter subsequent to the death of the police officer.

The Court at pages 52 and 53 makes this distinction in the following language:

“Appellant further contends that the right of the petitioner ‘is further clouded by the fact’ that the new charter, which went into effect January 8, 1900, contains provisions revising the law governing police pensions in the city and county of San Francisco. (Citing Charter, c. 10, Art. 8.) This article of the charter, it is said, contains, in itself, a complete revision of the police pension system of San Francisco; that the statute and charter provisions are not capable of harmonious operation; that it is competent for the legislature to repeal or modify the statute controlling such funds (citing *Pennie v. Reis*, 80 Cal. 266); and that the charter supercedes all laws inconsistent therewith. (Citing Const. Art. XI, Sec. 8.)

Kavanaugh died, however, before the charter was approved or took effect. At the time of his death, the statute under which the plaintiff asserts her claim was in full force, and this proceeding was commenced and the alternative writ of mandate was issued September 16, 1899, before the provisions of the city charter relied upon by appellant could have any force or effect. Respondent’s right therefore became vested while the statute under which she claims was in full force, and it was not competent for the Legislature, or any other authority, to deprive her of that vested right. (*Pennie vs. Reis*, 132 U. S., 471.)

With reference to the amendment of 1891, it merely amended the Act of 1889, by omitting the provision that one must have served for "**less than twenty years**" before those surviving him could receive the sum of One thousand dollars. This does not affect our question at all.

I therefore advise you that the petition should not be granted.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

**To Apply for Position in Fire Department Bars Recovery
by Martin Spellman.**

April 8th, 1910.

Gentlemen: I acknowledge receipt of your communication of April 1, 1910, accompanied by copy of petition of Martin Spellman to your Honorable Board, dated March 18, 1910, from which I understand you wish advice upon the following facts: the petitioner was a member of the San Francisco Fire Department prior to the adoption of the new Charter, ranking as a Fireman. The position of fireman held by petitioner, before the adoption of the Charter, corresponds, so I understand from your communication, to the position designated in the Charter as "lieutenant". Petitioner, after the reorganization of the Department, upon the adoption of the Charter, was assigned to the position of driver in the Department, and you wish to know if under these facts petitioner is now entitled to be assigned by your Honorable Board to the position of Lieutenant on account of Section 1, Chapter II, Article IX of the Charter.

Opinion.

This Section reads in part as follows:

“The Board of Fire Commissioners shall immediately after their appointment and qualification proceed to reorganize the Fire Department in conformity with the provisions of this Charter. In so doing the Board shall make its appointments of officers and members from the persons constituting the force in the service of the Fire Department at the time this Charter goes into effect. Such officers and members shall not be required to pass any Civil Service examination.”

The facts above stated show that the petitioner has delayed for ten years in making application for assignment as lieutenant, and I do not consider it necessary in this opinion, to go in to the question of his rights at the time of the Charter's adoption. He would certainly, from the facts you present for my consideration not be entitled at this late date, to the relief asked for.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

**Publication of Sample Ballots for Primary Election Under
New Primary Law.**

April 12th, 1910.

Gentlemen: I am in receipt of the following communication:

“I am directed by the Board of Election Commissioners to transmit to you the enclosed resolution, adopted by this Board, March 14th, 1910:

RESOLVED: That the opinion of the City Attorney of the City and County of San Francisco is hereby requested

and required by the Department of Elections upon the following questions:

1. May the requirements of Section 1 and Section 11 of the Direct Primary Law, approved March 24th, 1909, be satisfied by publishing the sample ballot referred to and required to be published by said Section 13, of said law, in **one** newspaper of general circulation as mentioned in said law, or must some ballot be published in two newspapers of the kind described in said law?

2. Where the primary ticket of each political party at the August Primary, 1910, will be the same in every assembly district as to nominees for member of Assembly and State Senator, must ballot of each party participating in the Primary, be published complete and separately for each assembly district? In other words, if six parties participate in the Primary, and each nominate an Assemblyman or more than one candidate in each assembly district of the eighteen assembly districts in San Francisco, to be voted for at said Primary Election, does the publication required by Section 13 of the primary law require that each such ballot in full shall be published, amounting in such a case to one hundred and eight separate ballots for publication.

3. If there is any way to avoid all such separate publications by omitting as to the assembly and senatorial districts the whole of the ballot except State senators and assemblymen, by general reference to the remainder of the ballot as being **similar** to a ballot referred to and published in the same publication by a statement substantially that the ballot for the.....party for the.....assembly district is the same as the ballot of the.....party for the 28th assembly district, published herewith except that the candidate for state senator is.....and the candidate for member of assembly is.....inserting the proper districts, political parties and names of candidates according to the fact."

Opinion:

As indicated in your letter, there are two sections of the Act "to provide for and regulate primary elections, approved March 24th, 1899", pertaining to the publication of the sample ballots, viz., Sections 11 to 13.

I will first consider Section 13 for the reason that it directs the publication of sample ballots to be made, while Section 11 provides the manner in which such publication shall be made.

Section 13 provides that:

"Such clerk or registrar of voters shall also cause sample ballots to be published twice in not more than two newspapers of general circulation published in his city or city and county, and such publication shall be made not more than twenty days nor less than ten days before such primary election."

It will be observed from the above that the publication of the sample ballot must be made twice **in not more than two newspapers of general circulation**. If this Section stood alone, I would say that a maximum number of newspapers was there provided for and not a limited number and that the clerk or registrar of voters was clothed with a discretionary power in the matter of the number of newspapers in which publication was to be made, and under that power could select one newspaper and be within the law, but all parts of the Act must be read together so as to give effect to each, following the approved mode of construing statutes, and we must look to Section 11 of the Act for further light. It is there provided that:

"Every publication required by this act shall be made in not more than two newspapers of general circulation published in such county or city and county, and one of such newspapers shall represent the political party that cast at the last preceding general election the highest number of votes in such county or city and county, and one of such newspapers, if any, shall represent the party which cast the

next highest number of votes at such election. In any case where the publication of the notices provided for by this act cannot be made as hereinbefore provided it shall be made in any newspaper having a general circulation in the city or county in which the notice is required to be published."

What before was doubtful is there fully explained and made certain. The publication of the ballots affecting the primary election in San Francisco, according to Section 11, must be made in two newspapers of general circulation published in this city and county, for obvious reasons that it is therein set forth that **one** of such newspapers shall represent the political party casting the highest number of votes at the last preceding general election and **one** of such newspapers, if any, shall represent the party which cast the next highest number of votes at such election.

In the event that there are not published in the County or City and County newspapers representing the parties casting the highest number of votes at the last general election then the publication, as provided for in Section 13, must be made in any newspaper having a general circulation in such County or City and County. You are advised in answer to your first query, that the publication of the sample ballot must be made as indicated above.

Before considering your second and third queries, both of which I will answer at the same time, they being intimately connected with the same subject matter, I wish to draw your attention to the fact that not only will the sample ballots be different in the various assembly and senatorial districts, as far as the nominees for those offices are concerned, but there will be a difference also in the number of delegates to conventions to be voted for in the Assembly Districts and also a difference in the fourth and fifth Congressional Districts, in which San Francisco is wholly or partly located, in the matter of candidates for representatives in Congress for those Districts.

As illustrative of the manner and method of construing statutes I may aptly quote the language of the Supreme

Court of this State in the case of Knowles vs. Yeates, 31 Cal., 82 at page 86, et seq:

“Rational interpretation is when the words of an instrument do not express the author’s intention perfectly, but either exceed or fall short of it, so that the intention is to be collected from probable or rational conjectures only; and mixed interpretation, that is, an interpretation partly literal and partly rational, is when the author’s words, though they do express his intention when rightly understood, are in themselves of doubtful meaning, rendering it necessary to have recourse to the like conjectures to find out in what sense the words were used; in which case the intention is collected from the words, but not without the help of other conjectures. (Rutherford’s Institutes, B. 2, Ch. 7, Sec. 3.) By means of these rules of interpretation the spirit of the text is saved from sacrifice to its strict letter. When the provisions of a statute or of the organic law are clear and precise, and attended with no difficulty in the application, there is no room for any interpretation or comment. The intention of the lawgiver is what must be adhered to. But if the language of the instrument is indeterminate, vague or susceptible of a more or less extensive sense, we must presume the intention according to the laws of reason and equity; and for this purpose it is necessary to pay attention to the nature of the things to which the question relates. In this connection Vattel says: ‘There are certain things of which equity admits the extension rather than the restriction; that is to say, that the precise point of the will not being discovered in the expressions of the law or contract, it is safer and more consistent with equity to suppose and fix that point in the more extensive than in the more limited sense of the terms.’ (Vattel, B. 2, Ch. 17, Sec. 300.) Kent says: ‘It is an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of

terms. When the expression in a statute is special or particular, but the reason is general, the expression shall be deemed general;’ and he holds that the reason and intention of the lawgiver will control the strict letter of the law when the letter would lead to palpable injustice, contradiction and absurdity. (1 Kent’s Com. 461, 462.) These authorities apply as fully to the interpretation and construction of constitutions as to contracts, treaties and legislative enactments.”

I quote this language to show that the primary election law of 1909, should be construed so as to avoid an absurd conclusion or construction.

Reverting again to Section 13, it is there provided that the clerk or registrar of voters shall cause such sample ballots to be published in certain newspapers and for a specified length of time. The primary object of the publication of such ballots is to inform the electorate of the candidates for nomination for the various offices. Any sane, reasonable method of conveying that information is sufficient under the law. True, it may be said that the registrar of voters could cause to be published sample ballots of all the political parties participating in the primary election, separately and completely for all the Assembly, Senatorial and Congressional Districts thus multiplying, ad infinitum, the publication of such sample ballots. I do not believe, however, that it was the intention of the lawmakers, in framing this statute, to impose such an absurd duty on the registrar of voters, and I am strengthened in my unbelief by Sub. 4 of Sec. 1 of the Act itself, which says:

“This statute shall be liberally construed, so that the real will of the electors shall not be defeated by any informality or failure to comply with all provisions of law in respect to either the giving of any notice or the conducting of the primary election or certifying the results thereof.”

It is my opinion that the requirements of the Act can be fully complied with by publishing such sample ballots in the

manner suggested by you, that is, by omitting as to Congressional, Senatorial and Assembly Districts the whole of the ballot except Congressmen, State Senators, Assemblymen and delegates to convention, by general reference to the remainder of the ballot as being **similar** to a ballot referred to and published in the same publication by a statement, substantially that the ballot for the.....Assembly District is the same as the ballot for the.....party for the 28th Assembly District, published herewith, except that the candidate for Representative in Congress is.....and the candidate for State Senator is.....and that the candidate for member of the Assembly is.....and that the number of delegates to.....convention is....., inserting the proper districts, political parties and names of candidates, according to the fact.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Decision in Nicholls vs. Koster does not Affect Right of City to Retain Fines Imposed for Cruelty to Children and Animals.

April 13th, 1910.

Gentlemen: Replying to your communication of April 5th relative to the claims of the Pacific Humane Society and United States Protective Association, I submit that the views heretofore expressed upon the validity of these claims have not been altered by the decision of the Supreme Court in Nichols vs. Koster, the probation officer's case.

This case merely held that the appointment and compensation of probation officers was subject to the regulation of the legislature inasmuch as the charter was silent on the matter, the officers being county officers and attachés of the Superior Court.

In regard to the fines imposed in the prevention of cruelty to children and animals the Charter particularly provides that they shall inure to the City and that the Supervisors may make such appropriation thereof for the support of these Societies as they (the Supervisors) deem necessary.

It is the clear intention of the Charter to make these fines a part of the municipal revenue and to assume, on the part of the City and County, the expense of the prosecution of violations of the cruelty to animals laws. In this connection the power is given to the Supervisors to make such appropriation as they deem necessary for the support of societies organized for the prevention of cruelty to animals and this power cannot be curtailed without an amendment to the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Franchise for Street Railroad, Granted by Board of Supervisors, May Include Permission to Erect Poles for Stringing Power Wires.

April 15th, 1910.

Gentlemen: I am in receipt of a request for an opinion under date of March 18th, 1910, sent by the Clerk of the Board of Supervisors, which reads as follows:

"I am instructed by the Public Utilities Committee of the Board of Supervisors to refer to you for an opinion, the question of powers of the Board of Supervisors to include in Ordinance granting franchise for street railway to Mr. A. J. Pon, the construction of poles, feed, trolley, guy, stay and sustaining wires.

The cause of submitting this question has arisen from the protest of former Supervisor, Mr. Wm. N. McCarthy, in which he asks that question of the right of the Board to

pass an Ordinance granting an irrevocable right for the erection and maintenance of permanent obstruction upon the streets, be submitted to the City and County Attorney for his opinion."

The proposed franchise to operate a street railroad on Gough Street, commencing at the intersection of Gough and McAllister streets, thence running southerly along Gough Street to its intersection with Haight, Market and Valencia streets to connect with the existing lines on McAllister and Market streets, includes the following language:

"Sec. 2. It shall be lawful, and said....., its successors or assigns, shall have the right to build, construct, erect and maintain all necessary poles, feed, trolley, guy and sustaining wires overhead construction, etc."

Apparently your request for an opinion arises from the objections made to the inclusion of said language and said rights in the ordinance and in the franchise.

I am of the opinion that the Board of Supervisors has the right to include said language in the ordinance and in the franchise and that it is within the power of the Board of Supervisors to provide in the franchise for the erection and placing of poles as a means of carrying wires through which electricity is to be conducted for the purpose of running cars over the route designated in said franchise.

Respectfully,

PERCY V. LONG,

City Attorney.

Public Utilities Committee.

Construction of Ordinance Prohibiting Saloon Within 150 Feet of School or Church.

April 30th, 1910.

Gentlemen: I am in receipt of your communication of April 19th, 1910, in which you ask concerning the proper construction of Ordinance No. 1038, which reads as follows:

“Sec. 6. No permit shall be granted to conduct any newly established place or saloon where liquor is sold to be consumed on the premises when the same is located within 150 feet of any church or school.”

You ask to be advised as to the proper method of making measurements in enforcing this Ordinance.

The Ordinance imposes upon your body the duty of denying any application for a permit to sell liquor in any newly established place or saloon within 150 feet of a church or school. As to how the distance shall be measured is a matter that your Board can settle by rule. The rule adopted should be uniform and apply to all applicants alike.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

Interpretation of Word “Enrollment” in Rules of Board of Education Fixing Salary Schedule and Time when Such Interpretation Must be Made.

May 3rd, 1910.

Gentlemen: I am in receipt of your inquiry of the 8th inst., as follows:

“Does the word ‘enrollment’ in paragraph 1, or the words ‘total enrollment,’ in paragraph 2, of the salary schedule 1909-10, bind the Board of Education to consider such words as meaning the enrollment for the year preceding the one in which that schedule went into effect?

“If the words ‘enrollment’ or ‘total enrollment’ may be construed by the Board to mean the enrollment for any one day or any one month of such preceding year, must the Board of Education formally so declare, at the time of the adoption of salary schedule or prior thereto—or, if the Board

declares such interpretation at a time subsequent to the adoption of said salary schedule, will such action be legal?

If the Board formally takes no action whatever to interpret said words "enrollment" or "total enrollment", but merely through individual members, directs its Financial Secretary to interpret "enrollment" or "total enrollment" to mean the enrollment of one month, is such action legal?"

Opinion.

Answering your first inquiry you refer to paragraphs 1 and 2 of the salary schedule for grammar schools adopted by your Board for the year 1909-10, which reads as follows:

"ELEMENTARY SCHOOLS.

Grammar.

	Per Annum	Per Month
Schools in which the enrollment is 800 or over, and in which the number of grammar grade pupils is 325 or over, will be ranked as Class 1, Grammar Schools, and the principals will be paid the salary of.....	\$2,460.00	\$205.00
Schools in which the total enrollment is 400 or more, but less than 800, and in which the number of grammar grade pupils is 225 or more, will be ranked as Class 2, Grammar Schools and the principals will be paid a salary of.....	2,160.00	180.00

1. You inquire as to whether the words "enrollment" and "total enrollment" mean the entire enrollment for the entire year preceding the year when the schedule went into effect, or whether it may be construed to mean the enrollment for any one day or one month of such preceding year.

Your Board can, of course, in adopting such a rule specifically state exactly what is meant by the word "enrollment"

or, in the absence of so exactly stating this meaning, I am of the opinion that a reasonable construction of the word "enrollment" would be such as would refer to the enrollment as of the day when the salary schedule went into effect, or as of some day within a reasonable time previous to that date, or, as to some reasonable period of time preceding the time when the schedule went into effect, as, for instance, the period of one month. Throughout this salary schedule for 1909-10 we find the word "enrollment" used. For instance, High School salaries for "principals having fewer than 400 pupils enrolled will be" etc; and for "principals having over 400 or under 700 pupils enrolled will be," etc.; and for "principals having more than 700 pupils enrolled will be," etc.; and in the Primary Schools it is stated that "in primary schools having an enrollment of 700 or more pupils the principal's salary will be" etc; and in such schools "having an enrollment of 400 and less than 700 pupils the principal's salary will be" etc; and in such schools "having an enrollment of 150 pupils the principal's salary will be", etc. In all of the above there is no mention of an average enrollment but we note in the "General Directions" of the same salary schedule that an average attendance is referred to as follows:

"In classes consisting of two grades the salary of the higher grade will be paid when the **average attendance** in the higher grade equals or exceeds two-fifths of the **average attendance** for the class; provided, that when the **average attendance** of the entire class is less than forty the salary of the lower grade will be paid";

and concerning "Grammar Schools" the same salary schedule states:

"In all schools consisting of more than four classes, the minimum **average daily attendance** per primary class, exclusive of first grades and classes of more than two grades, shall be forty; and the minimum **average daily attendance** per grammar class shall be forty-five";

and in the provision as to "Yard Assistants" in the same salary schedule the Board provides that:

"In Primary schools having an **average daily attendance** of five hundred or over, the principal may name for the approval of the Board, an assistant to perform yard duty, who shall be paid therefor ten dollars per month in addition to her regular salary."

It would seem from the above that the Board of Education distinguishes between an average attendance and a stated definite enrollment at a particular time, as, they use the words "average daily attendance" etc., when they wish this meaning to attach to the rule, whereas no reference is made to an average daily attendance in the rule concerning which you inquire.

2. Answering your second inquiry, it would doubtless be more definite and exact for the Board of Education to formally declare the meaning of the word "enrollment" at the time of the adoption of a salary schedule. There is, however, no legal requirement for your Board to so define the word. The word "enrollment" is well understood in the language and requires no particular definition by your Board. In enforcing the rule, I am of the opinion that if your Board declares an interpretation at a time subsequent to the adoption of the salary schedule, that this action would be legal, provided, of course, that the interpretation be made to apply to all schools alike and that no different interpretation be given in the case of one school than has already been given in the case of another school under the same rule. For Sec. 4, Chap. III, Art. VII of the Charter provides that "the Board shall between the first and twenty-first days of May of each year, adopt a schedule of salaries for the next ensuing fiscal year, for teachers and all employees of the School Department." That is, this schedule must be the same throughout the year.

3. From what has been said above it will be seen that I am of the opinion that it is not necessary for the Board to

formally take action to interpret the said word "enrollment" or "total enrollment" and therefore if the Financial Secretary as a matter of fact interprets these words as intended by the Board of Education this action would be legal although the Board may not formally define them.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

Supervisors May Acquire the Lick Baths as a Public Utility.

May 5th, 1910.

Gentlemen: I am in receipt of your communication dated March 4th, 1910, in the following terms:

"I am instructed by the Hospital and Health Committee to refer to you the enclosed communication relative to offer of Mr. H. E. Matthews, Chairman of the Board of Trustees of the James Lick Baths, to turn over said Baths to the City, with the request that you furnish an opinion as to whether it is within the power of the Board of Supervisors to acquire and conduct said Baths, which are now being conducted by a Board of Trustees."

The Charter provides in Article XII, Section 14, that:

"The City and County shall have power to acquire, construct or complete any public utility from funds derived from taxes levied for that purpose, or from funds derived from the sale of bonds issued for that purpose, as is provided in this Charter, and may operate, maintain, sell or lease the same, subject to the other provisions and limitations of this Charter."

It is obvious that if a public bath be included within the term "public utility" then the Board of Supervisors has ample power to acquire the same.

Article XII, Section 1 of the Charter, prior to the amendment of February 5th, 1903, enumerated certain businesses as constituting public utilities, as follows: water works, gas works, electric light works, steam, water and electric power works, telephone lines, street railroads" and added the words "and other public utilities." The section as it now stands uses the general words "public utilities" to include all these things.

The inclusion of the words "and other public utilities" in the original section clearly shows the intent to make the phrase "public utilities" of such broad scope that its meaning cannot legitimately be restricted to include only public service corporations. This fact has been hitherto recognized by the municipality when it purchased the plant of the Sanitary Reduction Works and issued bonds for the erection of garbage incinerators, on the theory that they constituted public utilities.

In addition to public service corporations, those enterprises which conduce to the advancement of public health, safety, morals, etc., and lie within the legitimate functions of government, constitute public utilities in the broad meaning of that term. I believe that a public bath would come within the term of such a definition.

The establishment of public baths has long been recognized as a legitimate object of government and today, in New York, they are established and conducted under municipal authority.

So, in the case of *Poillon v. Brooklyn*, 101 N. Y. 132, it was held that the city of Brooklyn was properly invested with the power to establish a public bath and, by implication, had power to condemn property for that purpose.

And Lewis, *Eminent Domain*, Sec. 312 says: "Public bath houses, etc., * * * * are public uses for which, doubtless, private property should be condemned."

I am of the opinion that the Board of Supervisors has power, under the terms of the Charter, to acquire a public bath on the ground that it constitutes a public utility. Of course

the method of acquisition of such a public utility must conform to the Charter and the procedure there provided for must be strictly followed:

The Charter provides that a public utility such as a public bath may be acquired as follows:

1. The Board of Supervisors must pass an ordinance declaring its determination that public interest demands the acquisition of a public bath by the City and directing the Board of Public Works, to procure and file plans and estimates of cost of original construction and completion of a public bath. This ordinance must be published for two weeks.

2. The Board of Supervisors must solicit and consider offers of sale of existing baths from the owners thereof.

3. If the cost of the acquisition of the bath may be paid out of the annual revenue of the City in addition to the other necessary expenses of City government, a special tax may be included in the budget and levied for the purpose of acquiring the bath.

I understand that the Lick Baths are offered to the City as a gift but this fact does not waive the necessity of complying with the Charter requirements, particularly as the property offered to the City is subject to a mortgage which must be paid.

In compliance with your request I return with this opinion the papers forwarded to me by your Board.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Serpentine Avenue is Not a Public Street.

May 7th, 1910.

Gentlemen: I am in receipt of your communication dated April 18, 1910, as follows:

“1. Is Serpentine Avenue between Mission and Utah Streets, or any part of Serpentine Avenue, a public street?

“2. Is the strip of land formerly delineated upon the official maps of the City as Serpentine Avenue, or is any other portion of said strip of land, the property of the City?

“3. What jurisdiction has the City, if any, over this strip of land?”

Opinion.

The question of the status of Serpentine Avenue from San Jose Avenue to San Bruno Avenue arises periodically and has been passed upon on several occasions by former City Attorneys in written opinions given to various City officials. In order that the Board of Public Works may have a comprehensive idea of the situation in regard to the Avenue, I will review the proceedings taken by the United States Government, the Legislature of this State, and the Board of Supervisors, in relation to the closing up of Serpentine Avenue and the opening of Army Street, which street was designed to take the place of Serpentine Avenue.

On March 16th, 1878, the Legislature enacted a statute, entitled “An act to confer additional power on the Board of Supervisors of the City and County of San Francisco to provide for the opening of Army Street, and the condemnation of private property therefor. (Stats. 1877-78, page 270.)

Subdivision 1 of Section 1 of said Act provided for the acquisition of a tract of land lying contiguous to “Precita Creek”, from the Old San Jose Road to San Bruno Road, not less than sixty-four feet in width and without abrupt curves or short angles, for the construction of a sewer thereon and for the purpose of a public street.

Subdivision 1 of Section 1 of said Act authorized the Board of Supervisors, under such rules and regulations as they might prescribe, to sell at public auction to the highest and best bidders, all of Serpentine Avenue running from the Old San Jose Road to the San Bruno Road, except such portions thereof as might be required for the purpose of said sewer and street, as provided for in Sub. 1 of Sec. 1 of said Act.

The validity and constitutionality of the Act was passed upon and upheld on June 1, 1880, by John Luttrell Murphy, the then City and County Attorney, acting under a resolution, No. 14,673 (New Series), of the Board of Supervisors calling for his opinion thereon.

Acting under the power and authority vested in them by said Act, the Board of Supervisors, on April 22, 1878, by Resolution No. 12,212 (New Series), appointed a committee of four of its members to take into consideration the provisions of said Act and to suggest the proper action to be taken by the Board to carry out the same.

On May 6, 1878, the City and County Surveyor was instructed by Resolution No. 12,301 (New Series) to prepare the necessary surveys and maps, showing the land to be acquired for the purpose of a street.

Subsequently all of the land necessary for the opening of the street provided for in Sub. 1 of Sec. 1 was acquired, either by gift, purchase or condemnation, and the street thus created was called and is now known as "Army Street."

The Legislature in enacting the aforesaid statute, proceeded upon the theory and acted on the assumption, that the lands embraced by Serpentine Avenue belonged to this municipality. That assumption was afterward held to be erroneous by Judge Seawell of our Superior Court in the case of Christian Hellwig vs. City and County of San Francisco, holding in effect that Serpentine Avenue was not City property, inasmuch as it never was public land and had been abandoned as a public street by the Act of the Legislature aforementioned.

From the data at my command, it appears that the northerly line of Serpentine Avenue is the northerly line of the

“Rancho Rincon de las Salinas y Potrero Viego”, otherwise commonly known as the “Bernal Rancho”, which was granted to Jose Cornelio Bernal by the Mexican Government on October 10, 1839, and confirmed by the Government of the United States by a patent issued December 31, 1857, to Sibrian De Bernal and Jose Jesus Bernal, wife and child respectively of said Jose Cornelio Bernal, deceased.

On June 20, 1884, the United States Government issued to the City and County of San Francisco a patent to four square leagues of land, known as the “Pueblo” lands, according to the survey made by Von Leicht in December, 1883. This patent followed the decision of the Board of Land Commissioners, made December 21, 1854, and the decision on appeal to the Circuit Court of the United States in re City and County of San Francisco vs. the United States, was affirmed, confirming to the City four square leagues of land, bounded on the North and East by the Bay of San Francisco, on the West by the Pacific Ocean and on the South by a line drawn due East and West so as to include the area aforesaid, subject to the following deductions: Such parcels of land as have been heretofore reserved or dedicated to public use by the United States; and also such parcels of land as have been, by grants from lawful authority, vested in private proprietorship and have been finally confirmed to parties claiming under said grants by the tribunals of the United States or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein, for that purpose; all of which said accepted parcels of land are included within the area of four square leagues above mentioned, but are *excluded* from confirmation to the City.

I have shown that the Bernal Rancho was granted to Bernal by the Mexican Government, and that grant was confirmed by the United States before the decision above cited was given and therefore the said grant was excluded from the four square leagues confirmed to the City, and the same remained in private ownership.

Therefore I will answer your first and second questions in the negative, and advise you that the City and County of San

Francisco has no jurisdiction over the strip of land embraced within the limits of what was known as "Serpentine Avenue".

I may add that the conclusion reached above has been concurred in by former City Attorneys who rendered opinions thereon.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Board of Works May Consider Sufficiency of Petition for Street Work and Property Owner May Withdraw from Contract with Street Contractor for Street Work.

May 10th, 1910.

Gentlemen: I am in receipt of your communication of March 25, 1910, in which you request the opinion of this office on the following state of facts:

The City Street Improvement Company filed with your Board on March 19, 1910, a petition or application for permission to pave and curb 19th Avenue between California and Clement Streets, said petition being accompanied by a copy of a contract made and entered into by and between said corporation and certain owners of property fronting on said street representing the requisite two-thirds frontage, together with the necessary affidavit.

Subsequently, to-wit, on the 21st day of March, 1910, the Barber Asphalt Paving Company, also as contractor, filed with your Board an application or petition for permission to pave and curb the said street, accompanied by a copy of the contract made and entered into by and between it and certain owners of property fronting on said street representing two-thirds frontage, together with the necessary affidavit. Two of the owners of frontage aggregating 225 feet signed both contracts. One of said owners, representing 25 feet frontage,

by communication of date March 18, 1910, one day prior to the filing of the application for permission as aforesaid by the said City Street Improvement Co., notified your Board in writing that he withdrew his signature from his agreement with said City Street Improvement Co., while the other owner, representing 200 feet, on March 19, 1910, the date of the filing of the said City Street Improvement Company's application, informed your Board in writing that she had on December 28, 1909, withdrawn from the contract of said City Street Improvement Co., and wished her name stricken from such contract.

One of the essentials to the carrying out of the contract in either case is the obtaining of a permit from your Board as required by the provisions of Ordinance No. 288, approved May 2, 1901. If the withdrawal of either of the frontages represented by the parties mentioned from the contract of the City Street Improvement Company be effective and valid (the validity of such withdrawal being the issue involved in the matter), then in that case the frontage remaining represented on that contract would be deficient as the required two-thirds frontage would be lacking, and the priority of application, according to the said regulations of your Board, would be of no avail to said City Street Improvement Company.

Opinion.

Being impressed with the importance of this matter, not only so far as the decision of the question immediately involved is concerned, but as to the bearing such decision will have on future questions of similar nature, I have given your communication mature consideration, and afforded an opportunity to both sides of the controversy to present the matter from their respective viewpoints. On a day appointed Mr. Finlay Cook, attorney, representing the City Street Improvement Company, and Mr. Gray of the firm of Gray & Cooper, attorneys, representing the Barber Asphalt Company, appeared and presented their arguments and points, and the matter was fully discussed. Since that time both of said attorneys have

submitted briefs on their respective contentions, and have assisted this office in arriving at a conclusion in this somewhat, from a legal standpoint, involved matter.

Several collateral matters, not contained in your letter, arose in connection herewith, but I will endeavor to confine this opinion to those matters necessary only in answering your letter, which resolve themselves into two questions.

Can one party to a contract repudiate the same and thereby be released therefrom, leaving the party aggrieved to his suit for damages for the breach?

The law of this State on this point is contained in the case of *De Prosse vs. Royal Eagle, Etc., Co.*, 135 Cal., page 408. This was a case where the plaintiffs, as architects, were employed by defendants to prepare plans, etc., and oversee the construction of a building for a certain per cent of its cost. In the contract the plaintiffs were to perform the entire work, including the interior decorations. On a subsequent day, after some work had been done on the interior decorations, defendants addressed a letter to plaintiffs, notifying them in effect that they, defendants, had concluded to handle the matter of the interior decorations themselves.

Plaintiffs, notwithstanding said letter, proceeded with said work and brought an action, not on the original contract, but on a *quantum meruit*, seeking to recover the reasonable value of their services. And the question, as stated by Judge Garoutte in his opinion, was—Are they entitled to recover upon a *quantum meruit* for services rendered upon the interior decorations of the cafe between the time when the letter was written to them and the 17th of September, the time when they withdrew from the building?

Judge Garoutte then proceeds as follows:

“An action in *quantum meruit* is based upon the theory that one party has performed services for another at his request; and here, if defendant ordered plaintiffs not to perform services upon the interior decorations of the cafe, they could not recover in *quantum meruit* if thereafter they proceeded in

opposition to that order. Services performed under these circumstances would not be performed at the request of the defendant. This principle of law is approved by the trial court when it gave to the jury the following instruction: 'The plaintiffs cannot recover in this action for any work they may have done for the interiors of the building known as the Pabst Cafe, except such work, if there was any, as was done at the request of the defendant.'

"The court is thus brought to a consideration of the force and effect of the letter sent by defendant to plaintiffs. It is claimed upon their part that it is equivocal in character, and is not in effect a direction to cease and refrain from work upon the interior decorations. But the letter appears to be plain to the contrary, and such was the construction given it by the plaintiffs themselves. If they had come before the trial court claiming the letter to be equivocal, vague and indefinite, and asserted that they continued their labors through a misunderstanding or misconstruction of its force and effect,—that is, if its effect was to order them to cease work upon this particular part of the building,—another question would be presented; but no such case was attempted to be made out in the trial court, and it is apparent that plaintiffs understood the letter to mean exactly what defendant claims its meaning to be. The testimony of both plaintiffs is clear to the point that they understood by the letter that defendant ordered them to refrain from doing work upon interior decorations. One of the plaintiffs testifies as follows: 'On Monday we received the letter, and then, notwithstanding the letter, I went on and did the work. We did not stop work when we received that letter. We intended to carry out our contract, notwithstanding the letter.' There is no principle of law involved in the action of quantum meruit which will justify a recovery for services rendered, in the face of positive directions not to render those services by the party from whom it sought to recover. Here, as far as any principle of quantum meruit is concerned, plaintiffs had no right to perform services upon these interiors after ordered not so to do, and cannot recover for services so rendered.

“It is insisted that the contract for the service was an entire contract, covering the whole building inside and outside, and that defendant could not repudiate the contract as to a part, namely, the interior decorations of the cafe. This contention is unsound. As to defendant, it could repudiate a part of it or repudiate it all. In other words, a repudiation of a part of it was, as to plaintiffs, a repudiation of it all,—that is, plaintiffs had the right to consider the breach of this covenant a breach of the entire contract. The acts of defendant were a breach of the entire contract, but the breach could be waived by plaintiffs as to all portions thereof not included in that part relating to the interior decorations. As to all other matters, plaintiffs could waive the breach and continue their work. That was a matter entirely optional with them at the moment they were ordered to cease work upon the interior decorations. At that moment they were justified in law in ceasing from work upon all parts of the building if they so felt disposed. It is said in *Haskell vs. McHenry*, 4 Cal., 411: ‘The contract declared on was an entirety. The first breach by the defendant was a breach of the whole, and discharged the plaintiff from the performance of any conditions on his part. It gave him a complete right of action. (See *Cockley vs. Brucker*, 54 Ohio St., 214.)’ ”

The rule laid down in *De Prosse vs. Royal Eagle Co.* is sustained by the following cases:

Iowa: *Molina Scale Co. vs. Beed*, 52 Iowa, 307; 35 Am. Rep., 27.

Maryland: *Black vs. Woodrow*, 39 Md., 217; *Heaver vs. Lanahan*, 74 Md., 493.

Massachusetts: *Collins vs. Delaporte*, 115 Mass., 159.

Michigan: *Hosmer vs. Wilson*, 7 Mich., 294; 74 Am. D., 716.

Minnesota: *Gibbons vs. Bente*, 51 Minn., 409.

Nebraska: *Neb. City vs. N. C. H. L. Co.*, 9 Neb., 339.

New York: *Clark vs. Marsiglia*, 1 Den., 317; 43 Am D., 670. *Butler vs. Butler*, 77 N. Y., 472; 33 Am. Rep., 648. *Lord vs. Thomas*, 64 N. Y., 107.

North Dakota: *Davis vs. Bronson*, 2 N. D., 300; 33 Am. St. Rep., 783.

Vermont: *Danforth vs. Walker*, 37 Vt., 239.

Many cases were cited by Mr. Cook, holding against the views expressed by Judge Garoutte, among others the case of *Main St., etc., Co. vs. L. A. Trac. Co.*, 129 Cal., 301. It is sufficient to say that the later expression of opinion contained in the *DeProsse* case, cited above, controls. He cited also the case of *Martin et al. vs. Meles et al.*, 60 N. E. (Mass.) 397. In this case the learned Judge stated that the rule expressed in *DeProsse vs. Royal Eagle, etc.*, 135 Cal., was the correct one, citing cases to sustain that view, but that it did not apply to that case, for the reason that no notice to cease performance was given. He then goes on to state that even if a definite notice had been given, it would not have ended the rights of the plaintiff to go on under the contract in a case like the present, **where there was a common interest in the performance.**

The present case is very easily distinguishable from the case above, because in a private contract for street work, like the contract here, each of the property owners incurs simply a several and not a joint liability. This is apparent from the face of the contract itself, which is made between the City Street Improvement Company, the party of the first part, and certain owners of property whose names are thereunto subscribed, **each contracting severally**, parties of the second part. Further along in the contract the parties of the second part, **each for himself and not for the others**, promises that he will pay, etc. To my mind, nothing could be clearer than the language used to indicate the intention of each of the parties of the second part to contract simply for himself and for the number of feet owned by him, and that each of said parties did not sign said contract in consideration of the signature of any other property owner. At most, the obtaining of other signatures by the contractor would be a condition implied, before the signer would be bound. As was said by the Supreme Court, in *Smith vs. Luning* 111 Cal., at page 310:

“As the construction of the sewer in front of the defendant's lot, without obtaining a permit therefor from the superintendent of streets, would have been a violation of the city ordinance, and have constituted a misdemeanor, any agreement between the plaintiff and defendant to construct it without obtaining such permit would have been unlawful, and could not form the basis of a civil action. Parties to an agreement are, however, deemed to have intended a lawful, rather than an unlawful, act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract. As the obtaining a permit from the superintendent of streets was essential to rendering the agreement between the plaintiff and defendant valid, and as the instrument in question is silent upon that subject, the obtaining of such permit must be implied as a condition of the agreement between them, and the instrument signed by them as merely an inchoate agreement which would become effective and binding only in case such permit should be issued. This construction is corroborated by the terms employed by the parties to the instrument. It purports to be made between the plaintiff, as party of the first part, ‘and certain owners of property, lots, and lands fronting on Leavenworth Street, whose names are hereunto subscribed, each contracting severally, parties of the second part’; and in the body of the agreement the plaintiff agrees to and with the said ‘parties’ of the second part, and they, ‘each for himself and not one for the other’, agree to pay ‘for the work done in front of his or her own property respectively, and not in front of others, according to the ratio that his frontage bears to the whole frontage here represented’. In view of the requirement of the ordinance that the owners of three-fourths of the frontage on the block should sign the contract before a permit could be granted, it is evident that in signing the instrument there was implied a condition that, before the defendant was to be bound thereby, the plaintiff was to procure other parties thereto sufficient to entitle him to obtain the permit. If the plaintiff had refused to obtain such permit, and the defendant had attempted to enforce the agree-

ment in the form in which it is found, or to recover damages from the plaintiff for its breach, it would have been a sufficient answer for the plaintiff to say that the ordinance forbade him from doing the work."

I wish to call the attention of the Board to Sec. 12, Ordinance 240 and to Ordinance 288, relating to the granting of permits by the Board of Public Works.

"An agreement reading, 'We, the subscribers, hereby agree to pay to the City the cost of the curbstone so placed opposite our land on our side of the street' is a several contract."

Springdale vs. Harris, 107 Mass., 532.

"The question whether a contract is entire or severable can only be solved by considering both the language and the subject matter of the contract, and a contract will generally be held to be severable when the price is expressly apportioned by the contract or the apportionment may be implied by law to each item to be performed." (Syllabus.)

Moore vs. Bonne, 40 Cal., 251.

I hold, therefore, that the contract in question is an executory, several and not joint contract, and that any of the property owners may repudiate it and thereby terminate the same.

Can the Board of Public Works recognize the withdrawal of the property owners and refuse to issue permit?

It appears that your Honorable Board has adopted a standing regulation regarding the issuance of permits for the performance of street work under and by virtue of contracts made and entered into between contractors and owners of realty fronting on the proposed work, commonly known as "private contracts," which provide that no permission for the doing of any street work will be granted unless the owners of at least two-thirds of the frontage of the lots and lands upon the street whereon such work is to be done shall petition the Board in writing for such permission and shall have entered into a written contract therefor. Upon the receipt of such

petition the Board investigates the matter contained in the petition, and determines whether or not the public interest or convenience requires such work, or whether the same is expedient, and should it determine in favor of both propositions, the Board passes a resolution granting the required permission.

On the point as to the power of the Board to investigate a petition presented to it and determine whether the same is sufficient and whether the same shall or shall not be granted, I have examined the leading cases in California, and have arrived at the conclusion that the Board of Public Works has full power to do so and to grant a permit when the contract shall measure up to all the requirements of your regulation.

The case of *Spaulding vs. Homestead etc.*, Assn., 87 Cal., 45, lays down that doctrine in the following language:

“Even if, as strongly suggested by counsel for appellant, the act referred to does not provide, in express terms, for any determination of the matter of a petition, clearly where a board is empowered to receive a petition, and is vested with discretion in regard to the subject matter, it has the implied power to determine whether it shall be granted or not.

“To determine the necessity for the work requires the exercise of judgment on the part of the Board, and in order to properly reach the consideration of this fact, it would first have to determine whether the petition were sufficient or not.”

The decision in this case is, by analogy, applicable to the matter in question here.

The cases of *Kahn vs. Supervisors*, 87 Cal., 388, and *Mulligan vs. Smith*, 59 Cal., 206, holding that the Mayor had no authority or power to determine whether or not the petition presented for the establishment of Montgomery Avenue contained the required amount of property, represented by the persons signing the petition, were commented upon by the Court in the *Spaulding* case and distinguished from it, the Court saying that the proceedings in that matter were under a special statute. It will be remembered that in the *Kahn*

and Mulligan cases the Court held that executors, administrators and officers of corporations not authorized by their Boards of Directors to sign the petition, had no such power, and a petition, resting upon their signatures for sufficiency, was held to be deficient, in that it did not contain the names of owners of the property as disclosed by the assessment roll.

In view of the foregoing, I advise you as follows:

1st. That the withdrawal of the property owners who notified the City Street Improvement Company of said withdrawal is valid and effective.

2nd. That your Honorable Board has full power and authority to inquire as to the sufficiency of the petition and to that end may take cognizance of the said withdrawal, and in case said petition does not comply with the requirements of your regulation as to the granting of permits, you are vested with a discretionary power to deny the same.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

City Not Liable for Funds Misappropriated in City and County Treasury. Treasurer is Liable on His Bond.

How to Provide in Books of Treasurer for Misappropriations of His Predecessor.

May 18th 1910.

Gentlemen: I am in receipt of a request for an opinion dated March 30th, 1910, which reads as follows, to wit:

“I am directed by the Finance Committee of the Board of Supervisors to refer to you letter from John R. McDougald, Treasurer, under date of March 16th, 1910, relative to misappropriations from certain funds during the term of office of his predecessor, and requesting the Board of Supervisors to make provision for rehabilitation of these funds by either

placing the amount in the next tax levy, or the opening of deficiency accounts covering these various funds, with the request that you advise said Committee as to proper action to be taken by the Board in this regard, having reference to the action instituted by you against the former Treasurer and his bondsmen."

In reply I advise:

FIRST: Concerning payment of claims, funds for payment of which were in the Treasury, but which said funds have been misappropriated.

The City and County is not responsible for the same. Under Section 961 of the Political Code of the State of California "any person injured or aggrieved by the misappropriation of such funds has the right to commence suit upon the bond of said Treasurer to reimburse himself for the injury suffered."

It therefore follows that it is not incumbent upon the City and County of San Francisco to reimburse the funds depleted by misappropriation during the term of office of a former City and County Treasurer.

SECOND: Concerning the books of the office. I am of the opinion that it is proper for entries to be made in said books showing a deficiency which occurred prior to the taking of office by the present Treasurer, provided that it has been established to your satisfaction that such deficiency exists and that it occurred at the time stated. Otherwise said books, at the end of said Treasurer's term, would, prima facie, make it appear that the Treasurer was not turning over to his successor in office or himself as successor all funds received by him during his term of office or from his predecessor.

This, however, is a matter of bookkeeping for determination by your Honorable Board or the Treasurer.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Compensation Cannot Be Given President of Board of
Health in form of Fee for Making Out Death Certificate.**

May 18th, 1910.

Gentlemen: I am in receipt of your communication of the 12th inst., as follows:

"I am directed by the Hospital and Health Committee of the Board of Supervisors to refer to you a copy of a proposed Ordinance entitled, "Providing for the registering of death certificates and the issuing of burial and removal permits."

The Committee requests your advice as to form and legality of same."

PROPOSED ORDINANCE.

**ORDINANCE NO..... PROVIDING FOR THE REGISTER-
ING OF DEATH CERTIFICATES AND THE ISSUING
OF BURIAL AND REMOVAL PERMITS.**

BE IT ORDAINED by the People of the City and County of San Francisco, as follows:

Section 1. It shall be the duty of the President of the Board of Health of the City and County of San Francisco to keep a register of deaths in the City and County of San Francisco, wherein all deaths within said City and County occurring shall be recorded and registered.

Section 2. That the President of the Board of Health of the City and County of San Francisco is hereby authorized to appoint a deputy or as many deputies as may be necessary who shall perform all the duties prescribed by this ordinance, in case of the absence, illness, disability, or detention from office, by reason of his official duties as President of the Board of Health of the City and County of San Francisco.

Section 3. It shall be the duty of the said President of the Board of Health or his deputy to issue burial or removal permits, when a death certificate is properly made out and filed

in the office of the Board of Health and said President of the Board of Health shall before the fifth of each and every month make true and correct report of all certificates filed, burial or removal permits granted, to the State Registrar of Vital Statistics.

Section 4. That the said President of the Board of Health of the City and County of San Francisco, shall receive a sum not exceeding twenty-five cents for each death certificate properly and completely made out and registered with him and returned to the State Registrar on or before the fifth day of the following month, which sum shall include the making out of the burial or removal permit and the copy of the certificate to be filed and preserved in his office.

Section 5. That the person so filing said death certificate shall pay to the said President of the Board of Health of the City and County of San Francisco, for the same a sum not exceeding twenty-five cents for each death certificate properly and completely made out and registered with said Health Officer.

Section 6. Each deputy appointed as provided in this Ordinance shall be entitled to be paid the sum not exceeding fifteen cents for each death certificate properly and completely registered by him. The said fee shall be paid to said deputy out of the money so received for the purpose herein set forth.

Section 7. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

Section 8. This ordinance shall be in force and effect from and after its passage."

Opinion.

FORM OF PROPOSED ORDINANCE.

In the first place the proposed Ordinance is badly framed, but in view of the conclusion I have reached in regard to the legality of the Ordinance, it will be unnecessary to point out wherein it is deficient in form.

LEGALITY OF PROPOSED ORDINANCE.

Section 2 attempts to delegate the power of the appointment of deputies to the President of the Board of Health, whereas that power is vested only in the Board of Health by Section 5, Article X of the Charter, which provides:

“Sec. 5. The *Board* may appoint such officers, agents and employes as may be necessary for the proper and efficient carrying out and enforcement of the purposes and duties of the Board, and may fix their salaries and prescribe their duties. All appointments in the Department shall be made under the provisions of Article XIII of this Charter, and no person so appointed by the Board shall be removed without cause.”

In passing I call your attention to the fact that Article XIII, mentioned in the preceding section, refers to appointments under the Civil Service provisions of the Charter, and particularly to Section 11, of Article XIII, wherein it says that the provisions of the Article shall apply to the Board of Health.

Such an attempted delegation of power is unlawful and an ordinance adopted granting such delegation would be invalid.

The Act of the Legislature of this State, approved March 18th, 1905, (Stats. 1905, page 115) entitled “An Act for the registration of death, the issuance and registration of burial and disinterment permits and the establishment of registration districts in counties, cities and counties, cities and incorporated towns, under the superintendence of the state bureau of vital statistics and prescribing the powers and duties of registrars, coroners, physicians, undertakers, sextons and other persons in relation to such registration and fixing penalties for the violation of this act,” provides in Section 3 thereof, that in cities having a freeholders charter the Health Officer shall act as a local registrar of deaths and perform all the duties of that office, which duties are set forth in said act.

Section 1 of Article X of the Charter provides that the members of the Board of Health shall serve without compensation and that they shall elect one of their members president. No provision is made for the payment of a salary or compensation in any form to the member so elected President of the Board, and the conclusion necessarily follows that he shall perform the duties of that office without compensation.

It is a duty imposed upon the Board of Health, by Section 4 of the same Article to "enforce **all** ordinances, rules and regulations which may be adopted by the Supervisors, * * for securing the proper registration of births, deaths and other statistical information."

It is obvious that, it being the duty of the Board of Health to enforce all ordinances, etc., of the Board of Supervisors, without compensation, it would be a void, futile and invalid act on the part of the Supervisors to enact an ordinance of the character proposed, in which compensation is provided for the President of the Board of Health.

Summarizing the legal objections which exist against the adoption by the Supervisors of the proposed ordinance I hold that the ordinance would be invalid for the following reasons:

1st. That the members of the Board of Health shall serve without compensation in the performance of all the duties of that office, and that one of said duties is to enforce **all** ordinances of the Supervisors in the matter of the registration of deaths;

2nd. That the Board of Supervisors have no power to provide compensation in any form for a member of the Board of Health, whether as President or in any other capacity;

3rd. That the Board of Supervisors have no power to authorize the President of the Board of Health to make appointments of deputies; that power residing in the Board of Health under the Charter;

4th. That under the State law, as cited above, in cities operating under a freeholders charter, as in San Francisco,

the Health Officer shall act as a local registrar and perform all the duties thereof.

5th. That the Board of Supervisors have no power to transfer the duties of local registration of deaths from the Health Officer to the President of the Board of Health, such action being prohibited by Section 11, Article XI of the Constitution of California.

You are advised that the proposed Ordinance, if adopted by the Board of Supervisors, would be invalid.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Board of Health Shall Fix Salaries of Officers and Employees Annually, and Cannot during the Year Alter the Salaries.

May 19th, 1910.

Gentlemen: I am in receipt of your communication of the 16th inst., as follows:

“I have the honor to advise you that at a meeting of the Board of Health held on Friday, May 13th, a resolution was adopted, of which the following is a copy:

‘BE IT RESOLVED: That it be the sense of the Board of Health that they request the City Attorney to render an opinion as to the meaning of Section 10, Article 10 of the Charter of the City and County of San Francisco, particularly with reference to the power of the Board of Health to change or alter the salaries of officers or employes of the Board at any time during the fiscal year.’ ”

Opinion.

Sec. 10, Art. X of the Charter reads as follows:

“The Board shall fix annually the salaries of all officers and employes of the Board. Such compensation shall not

exceed salaries paid for similar services in private institutions of like character."

The Board of Health is authorized to fix **annually** the salaries of all officers and employees of the Board and when it has once exercised the power conferred upon it by the above section it has exhausted that power and cannot thereafter, during the year for which the salaries are fixed, again fix the same by increasing or decreasing them.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Health.

Claims for Damages Against City Must Be Presented to Board of Supervisors.

May 23rd, 1910.

Gentlemen: I am in receipt of your communication of the 20th inst., as follows:

"This Board is in receipt of a claim from the State Board of Harbor Commissioners, amounting to \$423.86, the same being the cost of repairing damages to Howard Street Wharf No. 3, caused by the fire boat "Dennis T. Sullivan" of this Department colliding with said wharf on January 27, 1910, and as the Board is in doubt as to what its jurisdiction and powers are in effecting a settlement of claims of this nature, we respectfully request that you kindly furnish an opinion upon the following points in question:

Does the Charter provide any regular procedure in the filing of claims for damages against the City or any department thereof, and for the settlement of the same?

Is this a matter that comes under the jurisdiction of this Board or the Board of Supervisors?

Has this Board the power to pay this claim out of the annual appropriation of this department?"

Opinion.

The answer to your first inquiry so completely disposes of the others propounded that it will be unnecessary to take them up in detail.

This is a claim for damages against the City and County and not against the Board of Fire Commissioners. The presentation of such a claim is regulated by Sec. 8, Chap. II, Art. II, of the Charter as follows:

“All claims for damages against the City and County must be presented to the Board of Supervisors and filed with the Clerk within six months after the occurrence from which the damages are claimed to have arisen; otherwise there shall be no recovery on any such claim.”

In view of that section, I advise you that your Honorable Board has no jurisdiction in the premises.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Bid for Supplies to School Department Cannot Be Accepted Unless Accompanied by Certified Check.

May 31st, 1910.

Gentlemen: I am in receipt of your communication of the 24th inst., as follows:

“I am directed by the Board of Education to request from you an opinion as to whether the Board may legally accept a certain bid for furnishing supplies to the School Department for the coming year. The circumstances are as follows:

When the bids were opened, it was found that no certified check accompanied the bid in question. By vote of this

Board, the bid was, therefore, rejected. This was at ten o'clock in the morning.

About four o'clock in the afternoon of the same day, the party who had submitted the bid, presented to the Secretary of the Board, a certified check dated the day previous to the opening of the bids, and stated that same had accidentally fallen from the envelope in which the bid was placed before leaving the office of the bidder."

Opinion.

In answer to your letter I respectfully call your attention to the opinion rendered by me to your Honorable Board on the 15th day of September, 1909, which appears on page 406 et seq of the published volume of the opinions of the City Attorney of the City and County of San Francisco for the year 1908-09. The conclusion reached by me in that opinion, predicated on a bid accompanied by a check not certified, was as follows:

"No bid may be received unless the bid is regular in all particulars. Nothing can be done, either by the bidder or by the Board, to make a bid that is irregular, regular after it has been filed. The bid must fall or stand as it has been presented. It follows in this particular case that the bid submitted was not regular, inasmuch as it was not accompanied with a certified check."

The question presented by your communication hereinabove is practically the same question as that presented in the former opinion and the same rule applies to the matter now under consideration.

You are therefore advised that you cannot accept the bid mentioned in your communication.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

**Advising as to Two Methods of Releasing Attachments in
Recorder's Office.**

May 19th, 1910.

Dear Sir: I am in receipt of your communication of the 17th inst., as follows:

"Referring to Section 560, Code of Civil Procedure, relating to the release of attachments, will you please inform me if it is necessary, in giving a valid release, to acknowledge the execution of the same. And, if your opinion is in the affirmative, should the Recorder accept releases of attachments when same have not been acknowledged."

Opinion.

There are two methods provided by law for the release of attachments as to any real property, one of such methods being that contained in Section 560, C. C. P. and the other that contained in Section 2983, Civil Code.

Section 560, C. C. P., provides:

"An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property; and upon the filing of such release, it is the duty of the recorder to note the same on the record of the copy of the writ on file in his office. Such attachment may also be released by an entry in the margin of the record thereof, in the county recorder's office, in the manner provided for the discharge of mortgages under section twenty-nine hundred and thirty-eight of the Civil Code."

Section 2938, C. C., provides:

"A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder,

who must certify the acknowledgement in form substantially as follows: "Signed and acknowledged before me, this..... day of....., in the year..... A. B., Recorder."

It will be seen therefore, that an attachment as to any real property can only be released either:

1st: By a writing signed by the plaintiff or his attorney, or the officer who levied the writ of attachment and **acknowledged** and recorded in the like manner as a grant of real property.

2nd: By an entry in the margin of the record of such an attachment signed by the plaintiff, or his attorney, acknowledging the release of such attachment in the presence of the Recorder, who must certify the acknowledgement in form substantially as follows: "Signed and acknowledged before me this.....day of.....in the year....., A. B., Recorder."

Section 1161, Civil Code, provides that before an instrument can be recorded, unless it belongs to certain classes of instruments, of which a release of attachment is not one, its execution must be **acknowledged** by the person executing it.

Section 560, Code Civil Procedure provides also that it is the duty of the Recorder to note the release of attachment on the record of the copy of the writ on file in the office, but it is a prerequisite to that duty that the release of attachment be properly executed by one of the persons named in said Section and acknowledged.

Section 4173, Political Code, relating to the duties of the Recorder, provides that:

"When any instrument, paper or notice, **authorized by law to be recorded**, is deposited in the Recorder's office for record, the Recorder must * * * * * record the same without delay, etc."

In order that an instrument can be **authorized by law to be recorded** it must comply with all the forms and requirements of law, and a release of attachment as to any real property,

without having the execution thereof acknowledged, is deficient and is not an instrument "authorized by law to be recorded."

You are advised that in order to constitute a valid release of attachment as to any real property, it must be:

1st: Executed and acknowledged by the plaintiff or his attorney or the officer who levied the writ, as provided in Section 560, Code of Civil Procedure; or

2nd: By a marginal entry in the record of such attachment, signed by the plaintiff or his attorney, acknowledging the release of such attachment, in the manner provided in Section 2938, Civil Code, and that it is your duty to require that such release conforms to either of such methods.

Respectfully,

PERCY V. LONG,
City Attorney.

The Recorder.

Proposed Stockton Street Tunnel. How It May Be Constructed.

June 11th, 1910.

Gentlemen: I am in receipt of your communication of June 7th, 1910, in which you ask to be advised whether it is possible to construct the proposed Stockton Street Tunnel between Sutter and Sacramento streets by the creation of an assessment district.

1. The term "assessment district", I assume, refers to the plan outlined in what is generally known as the "Vrooman Act", the general State law providing for street improvements, and the provisions contained in Article VI of our Charter. The Vrooman Act, as adopted in 1885, with its subsequent amendments, has been incorporated with few changes in the Charter as adopted in 1899. The original Act of 1885 contained no provision for the construction of

tunnels, but by amendment of 1893 to Section 2 of the Act provision was made for the improvement of streets by the construction of tunnels, and it may be taken as settled that in a proper case such work would be included in the term "street improvement" under the State law.

Upon the adoption of the Charter in 1899 provision was made in Article VI thereof for the improvement of the streets of the municipality and in Section 26 of Chapter II of Article VI, the word "improvement" was declared to include grading, paving, planking, macadamizing, piling and capping, and the construction and repairs of sewers, cesspools, manholes, culverts, drains, sidewalks, and curbs. This language is almost identical with that of Section 2 of the Vrooman Act as amended in 1893, with the omission of the word "tunnels".

At the same time provision was made in Subdivision 26 of Section 1 of Chapter II of Article II of the Charter that the Board of Supervisors should have the power to construct or permit "the construction of tunnels under such rules and regulations as the Board may prescribe." This would evidence an intention on behalf of the Charter framers to give to the Board of Supervisors the power to construct tunnels in any part of the City where deemed necessary and to remove the construction of tunnels from the so-called "street improvement" provision of the Charter.

That the construction of tunnels may be a general municipal improvement would go without question. As such it is a municipal affair and provision therefor can be made by the Charter and when so made controls over a general State law the same as in the construction of parks, playgrounds and school houses. The Board of Supervisors having the power to construct tunnels, the right to levy taxes for that purpose naturally follows and the construction being a public improvement, the provisions of Section 29 of Article XVI authorizing a bonded indebtedness for municipal improvements are broad enough to authorize the creation of a bonded indebtedness for such purpose. If this power rests in the Board

of Supervisors by provision of the Charter it cannot also rest in the Board of Public Works under the street assessment plan unless the Charter specifically so provides:

2. The proceedings proposed here are for the improvement of Stockton Street under the "change of grade" provisions of Chapter VI of Article VI of the Charter. The portion of Stockton Street affected is, I understand, an accepted street. Such being the case, under the provisions of Section 23 of Chapter II of Article VI of the Charter, the City, and not the property owners, is liable for all costs of repair and improvement of the street. This is an express liability imposed upon the City by the positive terms of the Charter and it must be assumed to have been acted upon by the property owners throughout the City.

In *Flickinger vs. Fay*, 119 Cal. 590, it was held that the City retained jurisdiction to order the improvement of accepted streets when the public interest or convenience required such improvement, and from the language there used it would appear that in some cases the City might have power to require the adjacent property owners or the people of a designated district to pay for such improvements, notwithstanding the provisions of Section 20 of the Vrooman Act, which are similar to those of Section 23 of the Charter above noted.

It may be that this liability to improve the street can be imposed upon the property owners only in a case where the improvement is similar to the work previously done upon the street and so may be confined to the cases arising under the change of grade provisions. Whether the obligation to make additional and new improvements to a street which has been fully accepted by the City may be imposed upon the property owners has never been decided.

Section 9 of Chapter VI of Article VI of the Charter indicates that it is the same character of improvement, if any, which can be done under the change of grade plan. This section provides:

“After the report of the Board of Public Works as to the damages caused by such change of grade has been fully passed upon by the Board of Supervisors, such Board of Public Works shall prepare detailed plans and specifications subject to the approval of the Board of Supervisors, for regrading, paving, sewerage, sidewalking, curbing or otherwise improving such street or streets as set forth in said resolution of intention and shall then advertise for bids to perform the work of regrading, repaving, sewerage, sidewalking, curbing or otherwise improving such street or streets, as the case may be, with the same or other material with which the same have been formerly graded, paved, sewerage, sidewalked, curbed or otherwise improved.”

If the property owners are satisfied to stand the assessment for this improvement there can be no objection to their taking the initiative and performing the work themselves under such regulations as your Board may prescribe, but if the Charter does not give the Board of Supervisors jurisdiction to **compel** the property owners to stand the assessment, then the smallest owner in the district would have the right to prevent the work.

In the case of *Sievers vs. Root*, 10 Cal., App. 337, the District Court of Appeal held that the Board of Supervisors of this City and County was without power to change the grade of Polk and Chestnut streets to the damage of a property owner without first making provision for compensation for the damage resulting. The Court there said that the property owner could recover damages in an action at law after they had been inflicted, or could prevent the threatened injury by injunction, quoting *Guerkink vs. Petaluma*, 112 Cal. 310, as follows:

“Until compensation was made the City had no right to damage the plaintiff’s property. Payment of such damage was a condition precedent to the creation of the right; and until payment the City was a trespasser. In such a case injunction is the plain, ordinary and best remedy.”

A great many cases of the Supreme Court of this State are quoted in the Siever's case and the law may be taken as settled that the City is without power to change an established grade until compensation is made to the adjoining property owners for the damage caused.

It is apparent that in view of the unsettled condition on the question involved both as to the power to form an assessment district for the construction of a tunnel and the power to improve accepted streets by local assessment, difficulty would be experienced in inducing contractors to undertake the work under the assessment plan. I am not sufficiently satisfied in my own mind that the work cannot be done under the assessment plan as to advise you it cannot be so done and it seems to me that, in view of the importance to the City of the work proposed, the right to form an assessment district for such purpose should be brought to an issue in some test case so that the law may be settled.

You are accordingly advised as follows:

(1) That the proposed work may be done by the City and paid for either by the issuance of bonds or by general taxation, compensation being made to property owners damaged.

(2) That it may be done by the property owners by voluntary assessment and compensation to property owners damaged, under such regulations as your Board may prescribe.

(3) That, if it is desired to perform the work by the assessment district plan, the matter should be submitted upon an agreed case to the Court for a final determination.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Electric Plant for Lighting Golden Gate Park May Be Established Therein—But Not to Light Surrounding District.

June 11th, 1910.

Gentlemen: I am in receipt of your communication of the 10th inst., as follows:

“Your attention is hereby called to Resolution No. 5939 (New Series) of the Board of Supervisors, passed May 23rd, 1910, requesting you to render an opinion to said Board upon what right the City and County has to establish an electric plant in Golden Gate Park for the purpose of furnishing light to the Park and surrounding district.”

Opinion.

Pursuant to the provision of the Charter contained in Article XIV, thereof, the Park Commissioners are given jurisdiction, management and control of Golden Gate Park, and the exclusive right to erect and to superintend the erection of buildings and structures thereon. This power is conferred upon said Commissioners to the exclusion of all other Commissioners and officials of the City government.

By virtue of the provisions of said Article, the Park Commissioners have the right to install an electric plant for the purpose of lighting said park.

There is another section in the Charter, however, giving the Board of Public Works power, under such ordinances as may be adopted by the Supervisors, of lighting the Parks. I refer to Section 9, Article VI, Chapter I, which is as follows:

“Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors * * *

“3. Of cleaning and sprinkling of all public streets, avenues, alleys, places, courts, roads, highways, and boulevards, and the lighting of the same, and the lighting of the parks, squares, and other public places and public buildings.”

I have been unable to find any Ordinance of the Board of Supervisors conferring on the Board of Public Works the duty of lighting the parks of this municipality, and until such an Ordinance is adopted, the power and duty of lighting the same remains in the Park Commissioners.

The right of the City and County to install an electric plant for the purpose of furnishing light to Golden Gate Park is governed by the provisions of the Charter quoted above, and the City is empowered to install the same therein, but such power is to be exercised by the Park Commissioners and them only, in the absence of an Ordinance giving such authority to the Board of Public Works.

The matter of the lighting of the district surrounding Golden Gate Park presents a different question and involves the right of the City and County to use the said Park for purposes other than strictly park purposes.

It cannot, by any stretch of imagination, be considered that the lighting of the district surrounding Golden Gate Park, and the erection of a building suitable for the purpose of housing an electric plant, is within the objects and purposes for which Golden Gate Park was dedicated to the public. The lighting of Golden Gate Park and the lighting of the district surrounding the same are separate and distinct propositions.

I quote in this respect the language of the Supreme Court in the case of *Spires vs. City of Los Angeles*, 150 Cal., page 67, wherein was considered the right of the City of Los Angeles to erect a library building in Central Park, in that City, and while the Court upheld that right on the ground "that the establishment of a public library, to which visitors of the Park have access, is consistent with such public enjoyment and tends to enlarge it," then proceeded to say:

"Of course, if a municipality were undertaking to establish on this property a city hall, fire-engine station, hospital or jail, endeavoring to devote the property (assuming it was dedicated for a public park) to the erection of buildings or offices or structures for use in the transaction of municipal business, a different question would be presented, and there would be little hesitancy in holding that it could not do so."

The erection of a building for use as an electric plant to light the district surrounding Golden Gate Park comes within the purposes which the Court holds the City and County has no right to use a park for, when it is dedicated, as is Golden Gate Park, to the use of the public as such.

Therefore, I advise you:

1st: That the City and County has full power to erect an electric plant in Golden Gate Park to light said Park, and that such power must be exercised by the Park Commissioners in the absence of an ordinance granting such power to the Board of Public Works;

2nd: That the City and County has not the right to erect such a plant for the purpose of lighting the district surrounding Golden Gate Park.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Rear Yards Not Required by Tenement House Act When Lot
Runs Through from one Street to another Street or to
Alley of not less than 16 feet in width.**

June 25th, 1910.

Gentlemen: I am in receipt of your communication of June 23rd, 1910, in which you state that "application has been made to this Board for permission to erect a tenement house on an inside lot having a frontage of 59 feet and 6 inches on the main street and a depth of 60 feet to a rear alley 20 feet in width". You further state that the plans and specifications do not provide for a rear yard such as is required by Section 20 of the Tenement House Act.

Your Chief Building Inspector is of the opinion that the application should be granted, but, upon his suggestion, in

view of the uncertainty of the law, you desire my advice as to whether or not the application should be granted.

Opinion.

Section 20 of the Tenement House Act provides "that behind every tenement house hereafter erected there shall be a yard extending across the entire width of the lot, and, **except as provided in Section 23**, at every point open from the ground to the sky unobstructed."

Section 23 of the same Act provides that:

"Whenever a tenement house is hereafter erected upon a lot which runs through from one street to another street or to an alley of not less than 16 feet in width and said lot is not less than 80 feet nor more than 100 feet in depth, there shall be a yard space through the center of the lot midway between the two streets, which space shall extend across the full width of the lot and shall never be less than 12 feet in depth from wall to wall. * * *"

There is no express provision in either of the above quoted sections, or elsewhere in the Act, which exempts from the requirements of Section 20 lots running through from one street to another street or to an alley of not less than 16 feet in width. The excepting clause in Section 20, "and except as provided in Section 23", has reference merely to the provision of Section 20 that the yard shall at every point be open to the sky unobstructed.

I am of the opinion, however, that by reading Sections 20 and 23 together, lots running through from one street to another street or to an alley of not less than 16 feet in width are by clear implication exempted from the operation of Section 20. Section 23 applies only to lots running through from one street to another street or "*to an alley of not less than 16 feet in width.*"

If it had been the intention of the Legislature to require the rear yard space in addition to the midyard space specified in Section 23, there is no apparent reason why Section 23

should have been limited with reference to the class of lots running through from a street to an alley to only those lots running through from a street to "*an alley of not less than 16 feet in width.*"

Further evidence of the implication that the rear yard space is not required in the erection of tenement houses on lots classified in Section 23, is found in the language of Section 20. Unless we construe the Act as exempting such lots from the requirements of the rear yard space, the clause of Section 20 "and except as provided in Section 23" would be surplusage and meaningless. If it had been intended that notwithstanding the midyard space the rear yard space would nevertheless be required, the insertion of that clause has only led to confusion and ambiguity, since the excepting clause only applies to whether or not the yard space shall be left open from the ground to the sky unobstructed. Whether the yard space shall be left open from the ground to the sky, as regulated in Section 23, only arises as to the mid-yard space. Section 23 in no way has any application to the rear yard space. Placing in Section 20, which provides only for a rear yard space, an exception to the requirement that the yard space shall be left unobstructed to the sky when the lot is of a class specified in Section 23, would clearly seem to imply that Section 23 was to entirely govern as to the placing of the yard space in those classes of lots specified in Section 23.

In view of the language of Sections 20 and 23, I am of the opinion that where the mid-yard space is required by Section 23 the rear yard space is not required. Section 23, however, operates only as to lots more than 80 feet in depth, and no provision has been made for lots running through from street to street or to an alley of not less than 16 feet in width where the lots are less than 80 feet in depth.

The reason for exempting from the operation of Section 20 lots more than 80 feet in depth running through from street to street or from a street to an alley of not less than 16 feet in width cannot rest upon the fact that a mid-yard space is required by Section 23 of such lots, but they are exempted

apparently because such lots abut upon a street or alley more than 16 feet in width, and tenement houses erected thereon are thereby insured all necessary light and air space.

The requirement of the mid-yard space in lots more than 80 feet in depth can have no reference to whether the rear yard space is left or not. It is quite clear that in the judgment of the Legislature the necessity for a mid-yard space only exists when the lot exceeds 80 feet in depth, and only exists then because of the depth of such a lot, Section 23 making no reference to lots of less than 80 feet in depth running through from street to street. There is, therefore, left out of consideration by the Act a class of lots which stand in the identical situation of lots classified in Section 23 so far as the rear of those lots is concerned. No reason suggests itself why lots of more than 80 feet in depth running from street to street should be exempted from the rear yard space and lots of less than 80 feet in depth running from street to street should not be so exempted. It appears to me that if such exemption were made in favor of lots less than 80 feet in depth it would be an unconstitutional discrimination against owners of lots less than 80 feet in depth.

I am therefore of the opinion that all lots running through from street to street or from a street to an alley of more than 16 feet in width, irrespective of their depth, stand upon the same footing as regards the rear yard space. In the individual case in question to require the owner of this lot to leave a rear yard space would practically prohibit him from erecting a tenement house, for which the law seeks to secure ample light and air and safety as against fire, on a lot which affords particular advantages for securing to a tenement house erected thereon ample light and air and safety as against fire.

I therefore advise you that in this case the application should be granted in accordance with the opinion and recommendation of the Chief Building Inspector.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Positions of Superintendent and Matron of Juvenile Detention Home—How Filled.

July 23rd, 1910.

Gentlemen: I am in receipt of your communication of the 2nd inst., in which you state that the Board of Supervisors is in receipt of a communication from Harry A. Knox and Mrs. M. J. Knox, resigning their positions as superintendent and matron respectively of the Juvenile Detention Home, said resignations to take effect August 1, 1910. You desire to be informed as to whether the Board of Supervisors has any power of appointment in said offices.

Opinion.

The positions of superintendent and matron of the Juvenile Detention Home are created by the Act of the Legislature approved March 8, 1909, concerning dependent and delinquent minor children (Stats. 1909, page 213). Section 25 of said Act reads as follows:

“It shall be the duty of the legislative body of every county, or city and county, immediately upon this Act becoming effective, to provide and thereafter maintain, at the expense of such county, or city and county, a suitable house or place to be known as the ‘Detention Home’ of said county, or city and county, for the detention of dependent and delinquent children. Such detention home must not be in, or connected with, any jail or prison, and shall be conducted in all respects as nearly like a home as possible and shall not be deemed to be or treated as a penal institution. Such governing body must also provide for a suitable superintendent and matron to have charge of such detention home, and provide for the payment, out of the general fund of the county, or city and county, of suitable salaries for such superintendent and matron, such employees to be appointed by said governing body, upon the nomination of the probation committee and approval of the Judge of the Juvenile Court.”

You will therefore see from the above that the appointment of a superintendent and matron of the Juvenile Detention Home is to be made by the Board of Supervisors, said employees to be appointed, however, by the Board of Supervisors, upon the nomination of the Probation Committee and the approval of the Judge of the Juvenile Court, which Probation Committee and which Judge of the Juvenile Court are provided for in other sections of this Act.

I therefore advise you that upon the nomination of such Probation Committee, and the approval of the Judge of the Juvenile Court of this City and County, the Board of Supervisors has power to fill the vacancies hereinabove referred to.

Respectfully,

PERCY V. LONG,

City Attorney.

Finance Committee,

Board of Supervisors.

**Holladay Avenue, Between Army Street and Peralta Avenue,
a Public Street.**

July 30th, 1910.

Gentlemen: In a letter to this office of July 8th, 1910, you say:

“The attention of this Board has been called, through a communication addressed to it by O. Lervoog, Corresponding Secretary of the Peralta Heights and Vicinity Improvement Club, which communication is herewith transmitted, to the fact that the Bank of California, in an action to acquire title to certain land under the McEnerney Act, includes therein Holladay Avenue between Army Street and Peralta Avenue, or the land covered by it, and regarded as being a public street by the residents in its vicinity.

You are respectfully requested to advise this Board whether or not said Holladay Avenue, between Army Street and Peralta Avenue, is a public street.”

Opinion.

In the original map of the Precita Valley lands now on file in the County Recorder's Office, filed September 27, 1859, the following language is employed:

"I, Harvey S. Brown, proprietor of the land as herein subdivided, hereby declare this Map for all time to come, to be unalterable, and have this day filed the same in the Recorder's Office of the City and County of San Francisco, for descriptive and legal reference.

Witness my hand and seal this 26th day of September, A. D. 1859.

(Seal)

H. S. BROWN.

Witness, R. H. SINTON,
CLEMENT FERGUSON.

Filed at the request of R. H. Sinton, September 27th, 1859, at forty-eight minutes past 3 o'clock P. M.

F. W. BECKH,
County Recorder."

An examination of this map shows that at the lower or southerly end of the property referred to by you two branches or arms of California (now Holladay and Peralta Avenues) meet at an angle of about fifty degrees and from this point on to Precita Avenue (now Army Street) Holladay Avenue within the limit of half a block widens to an extreme width of about two hundred feet, which width it maintains for the remainder of the block. The land thus described was originally a knoll or hill. In the original map and in all subsequent maps which I have been able to find the side lines only of this property are delineated. No end lines exist. In other words, in the original map the property under discussion is an unbroken continuation of California Avenue from the junction of its two arms to Precita Avenue. On the very face of the map the property referred to by you is California Avenue. The words "California Avenue" are written in large characters on the original map a short distance below the property referred to

and have evident reference to the entire avenue extending to and opening into Precita Avenue. This would be clear enough and quite beyond all dispute but for the fact that the words "Gravel Pit" are written on the original map in small characters in the space described. These words, however, do not change the Avenue and the dedication thereof as an avenue as indicated on the map. They are descriptive words, which, taken in connection with the shaded markings or lines, show the knoll or hill and the ready and easy methods by which those acquiring near by lots (delineated upon and offered for sale by this map) can obtain suitable material which will at once grade their own streets and improve this portion of California Avenue.

It will be noted also, on the original map referred to, that to the westward of said designated portion of California Avenue and contiguous thereto, the lots laid down on the map are numbered 240, 241, while to the eastward thereof the numbering of the lots continues in regular order 242, 243, etc., also showing a clear intention to dedicate the said specified portion of California Avenue into which the descriptive words "Gravel Pit" are written.

It cannot be doubted that a discription of lots adjacent on the East or West to this portion of California Avenue or Holladay Avenue would be properly described as extending along California Avenue so many feet or to California Avenue, and lots 241, 242, 243, 244, 245, 246, 247, 248, may have been by the original grantor described as on California Avenue.

It may be well here to mention the further fact, as recognized by your Department, that in the original map referred to, California Avenue joined Precita Avenue at another point distant approximately one-half mile to the westward from the portion just considered and near where Coso Avenue now comes into Holladay Avenue. The latter parcel of land, like the first one considered, is somewhat irregular in shape into it is written in the original map the words "Gravel Pit." It has always been considered City property and the City has improved and paved the same. That the portion of Holladay

Avenue referred to by you has not been similarly improved is due principally to the fact that it is more difficult of improvement and the necessity for improvement was not so great.

I have no hesitancy in saying that the portion of Holladay Avenue referred to is City property and constitutes a part of California or Holladay Avenue as dedicated to the City by Harvey S. Brown, September 26th, 1859, in the map referred to herein.

Sometime after this dedication, I am informed, Harvey S. Brown met with reverses and certain of his properties were sold at Sheriffs and assignees sales. This property did not and could not have passed under any sheriffs or assignees sale of the properties of Harvey S. Brown for he had long prior thereto (in the year 1859) dedicated said property as a public street to the City and the filing of said map was a sufficient dedication and acceptance by the City.

I understand that taxes have not been paid by any one on this land and that it has been generally treated for a number of years by City officers as a public street and mapped as such.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Lands May be Paid for from Proceeds of the Auxiliary Fire Protection Bonds, if the Lands are Purchased and Used for that System.

August 4th, 1910.

Gentlemen: I have your request of July 27th, 1910, wherein you ask to be advised whether you have power to authorize the payment of two warrants in the sum of \$9,500 and \$8,200 respectively out of the proceeds of the Auxiliary Fire Protection Bonds, for the purchase of land at the corner of Drumm and Commercial Streets. The question as to the payment of these warrants out of the Auxiliary Fire Protection Bond pro-

ceeds apparently arises from a difference of opinion as to the purpose to which the land is to be devoted, it being claimed by the Chief of the Fire Department that it is to be used in connection with the Auxiliary Fire Protection System; on the other hand by the City Engineer that it is not to be used as a part of the Auxiliary Fire Protection System and is not included in the schedule thereof.

Whether the land was in the schedule submitted by the City Engineer to the Board of Supervisors prior to the submission of the proposed issue of bonds is immaterial, provided it is a necessary part of the Auxiliary Fire Protection System and sufficient funds remain from the proceeds of the sale of the bonds after all of the objects for which they were issued have been secured.

This question was considered fully in an opinion rendered by me to the Board of Supervisors on January 25th, 1909, and which appears at page 264 of the printed opinions of the City Attorney.

You are advised that if you find that the purchase of this land is a necessary part of the Auxiliary Fire Protection System then payment of the warrants may be authorized out of the bonds issued for that purpose.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

One Removed from the Fire Department Prior to its Reorganization Under the Charter, not a Member of the Department and is not Eligible to Appointment Without Civil Service Examination.

August 10th, 1910.

Gentlemen: I am in receipt of your communication of August 5th, which reads as follows:

“This Board respectfully requests that you kindly furnish it with an opinion on the following point.

Is it within the power or jurisdiction of the Board of Fire Commissioners to reinstate or restore to membership in this Department any ex-member thereof who severed his connections therewith prior to the reorganization of the department under the Charter in January, 1900, it being understood that the circumstances connected with the severance be in accordance with the opinion rendered by you in the matter of Esola of the Police Department and in the case of Thomas Howe of this department rendered in March last."

Prior to the adoption of the Charter no limit was placed upon the power of the Fire Commissioners to remove members of the Department and one removed at that time does not come within the conditions of the opinion rendered in the matter of Esola, above referred to.

Section 1 of Chapter II of Article IX of the Charter provides that in reorganizing the Fire Department after the Charter went into effect the Fire Commissioners should "make its appointments of officers and members from the persons constituting the force in the service of the Fire Department at the time this Charter goes into effect. Such officers and members shall not be required to pass any Civil Service examination. All future appointments and promotions shall be made subject to the provisions of Article XIII of this Charter."

It is apparent that one removed prior to the reorganization of the Department, under the section above quoted, was not a member of the Department at that time and consequently not eligible to appointment under the Charter without Civil Service examination.

You are therefore advised that you are without power to reinstate or restore such a person to membership in the Department except in accordance with the Civil Service provisions of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Henry H. Gorter, Appointed Battalion Chief and now Suspended, Though Serving as Superintendent of Engines, if Entitled to Retire upon Pension—Pension Estimated upon Rank of Battalion Chief.

August 10th, 1910.

Gentlemen: I am in receipt of your communication of August 5th, which reads as follows:

"I have been directed by the Board of Fire Pension Fund Commissioners to secure from you an opinion with reference to the following facts:

Henry H. Gorter, a regular member of the Fire Department, was appointed as Battalion Chief on August 30th, 1906; after serving as Battalion Chief for nearly two years he was assigned to duty as Superintendent of Engines on June 30th, 1908, and still serves in said capacity. He has made application for retirement on a pension, and the question before the Pension Board is as follows:

Whether as Superintendent of Engines said Henry H. Gorter is entitled to a pension under the provisions of the Charter, which requires that to be entitled to such pension the petitioner must have served in the rank to which he was appointed at least three years prior to the date of his application for a pension. Said Henry H. Gorter requests this pension under the rating of Battalion Chief. Would the fact of his having been assigned to duty as Superintendent of Engines effect his standing as Battalion Chief insofar as the three years service clause is concerned. I believe the rank and salary of Battalion Chief and Superintendent of Engines are the same."

It does not appear that the position of Superintendent of Engines has ever been ranked. The Charter provides that the Superintendent of Engines shall receive the same salary as that allowed a Battalion Chief.

From your communication it appears that Mr. Gorter has been regularly appointed a Battalion Chief and has never been removed or suspended from that rank. While holding the

rank of Battalion Chief he has been assigned to duty as Superintendent of Engines and has served as such since June 30th, 1908.

Such service does not affect his claim to the position and rank of Battalion Chief and it must be assumed therefore that he still retains that rank and is entitled to retire upon a pension such pension should be estimated upon the salary attached to that rank.

In this connection you are respectfully referred to the opinion rendered to your Board on April 1st, 1909, which is found on page 319 of the opinions of the City Attorney.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Pension Fund Commissioners.

Day on Which Primary Election is Held a Legal Holiday in the Meaning of State Law and City Ordinances.

August 11th, 1910.

Dear Sir: I am in receipt of your communication of even date as follows:

“Will you please inform me if Tuesday, August 16th, is to be a legal holiday, and if I am authorized by law to close the County Recorder’s office on that day?”

Opinion.

I take it that your communication requesting an opinion refers to Tuesday, August 16th, the day on which an election is to be held under the direct primary. This election is general throughout the State and comes within the purview of Section 10 of the Political Code, which after enumerating the particular days of the year which are holidays within the meaning

of the Code, includes in the list, "every day on which an election is held throughout the State."

On page 703 of the General Ordinances of the Board of Supervisors of the City and County of San Francisco is found Ordinance No. 324, adopted July 19th, 1901, which provides as follows:

"Section 1. Every day on which a Primary Election is held within the City and County of San Francisco, and every day on which Municipal Elections are held under and in pursuance of the provisions of the Charter of the City and County of San Francisco, are hereby declared holidays within said City and County, in conformity with the provisions of an Act of the Legislature of the State of California, approved March 23rd, 1901, entitled 'An Act Authorizing Boards of Supervisors or other Governing Bodies of Municipalities to Declare Holidays.' "

You are therefore advised that Tuesday, August 16th, being the day on which a primary election is to be held in the City and County of San Francisco, is a holiday within the meaning both of the State law and the ordinances of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Edmond Godchaux,
Recorder.

**Validity of Ordinance Imposing License Tax on Bankers is
Under Consideration by the Courts—No Refund Until
Determined.**

August 17th, 1910.

Gentlemen: I have your request for an opinion as follows:

"I am directed by the Finance Committee of the Board of Supervisors to transmit to you demands of the Mercantile Trust Company for refund of license tax claimed to have been

paid under protest, with the request that you advise said Committee whether the contention made in said demands that the ordinance imposing the license tax on bankers is null and void has any foundation in law.”

In reply will state that an action for the return of taxes referred to in said request has been or is about to be brought and I would suggest that no action be taken until said action is decided.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Building Law—Floors Immediately Beneath the Floors or Levels on Which Work Is Being Done Must Be Covered With Boards During Construction of a Building More Than Three Stories in Height.

August 17th, 1910.

Sir: I am in receipt of your communication of the 11th inst., which reads as follows:

“I desire your interpretation of Section No. 284 of the building law, the reason being that the question is continually raised, as to whether it is the sense that all floors must be covered below the level where work is being done, or merely the floor directly beneath the point mentioned.”

Section 284 of the Building Law is as follows:

“Any building more than three stories high in course of construction shall have the joists, beams or girders of each and every floor below the floor or level where any work is being done, or about to be done, covered with scaffold boards laid close together, or with other suitable materials, to protect the workmen from falling between joists or girders, and from falling bricks, rivets, tools or other substances whereby life and limb are endangered.”

Opinion.

At first sight the wording of the section appears to be somewhat ambiguous, but an analysis of it clears away all ambiguity and discloses the meaning and intent of the Board of Supervisors which it had in mind in the framing and passage of the ordinance.

By the terms of the ordinance it does not apply to or affect buildings of three stories in height or less. In buildings of more than three stories it provides that each and every floor below the floor or level where any work is being done, or about to be done, shall have the joists, beams or girders covered with scaffold boards, etc. Some confusion may arise in the construction and application of the words "each and every floor below the floor," etc. It appears to me, and you are hereby advised, that those words mean this:

That in the event that there is work being done, or about to be done, on only one floor in a building to which the ordinance applies, it is necessary only that the floor below that floor must be covered with scaffold boards, as specified in the ordinance.

In the event that work is being done, or about to be done, on two or more floors, the floors immediately below those floors must be covered with scaffold boards, as specified in the ordinance.

In other words, the ordinance does not make it compulsory to cover with scaffold boards all floors below the one on which work is being done, or about to be done. For instance, on a ten-story building work is being done on the tenth floor; under the ordinance the ninth floor only would have to be covered. If work was being done on the tenth floor and on the sixth floor, the ninth floor and the fifth floor would, under the ordinance, have to be covered with scaffold boards.

Respectfully,

PERCY V. LONG,
City Attorney.

Chief Inspector,
Board of Public Works.

**Proceeds of School Bond Issues to Be Expended Only for the
Lands or Schools Designated in the Bond Issue.**

August 17th, 1910.

Gentlemen: I am in receipt of your communication which reads as follows:

"I am directed by the Committee on Public Buildings of the Board of Supervisors to request an opinion as to whether there is any limitation of the power of the Board of Supervisors to expend proceeds of school bonds, issue of 1908, for any lands required for school purposes or the construction of any buildings being necessary, by the Board of Education and the Board of Supervisors, even though there may have been no mention made of such lands or buildings in the proceedings connected with such bond issue."

This same question was fully considered by me on January 25th 1909, and found at page 264 of the printed opinions of the City Attorney.

In accordance with the views therein expressed I am of the opinion that your Board is without power to expend the proceeds of the bond issue of 1908, for any lands or schools not designated in the bond issue unless the general purposes of the issue having been secured it is found impossible to purchase the block of land designated in the bond issue, in which case it would be proper to purchase another lot of land in the vicinity.

If, however, a particular school was designated and the amount for the construction thereof specified your Board would be without power to abandon the construction or repair of such school or to decrease the amount designated for its construction, so also, your Board would be without power to abandon the construction or repair of a particular school designated in the bond issue or use the proceeds thereof in the construction of a different and separate school in another part of the City.

The distinction between bond issues for the construction or repair of a school building and for the construction or repair of public streets is that the duty is always upon the City to repair its streets while no such duty is imposed upon the City for the construction or repair of school buildings, this is a duty which is imposed by law upon the school district and in authorizing the expenditure of money for the City and County for such purpose such act becomes valid only when considered as a matter of civic improvement.

Such being the case, I am of the opinion that the plans and specifications of the bond issue should be strictly followed in order that the general purposes therein outlined may be obtained.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Duty of Chief of Department of Electricity to Supervise and Determine the Necessity for the Erection of Poles, Wires, Etc.

August 17th, 1910.

Sir: I am in receipt of your communication of August 10th, which reads as follows:

“In our efforts to enforce the provisions of Ordinance 214 we have been confronted with a question by service companies who refuse to remove their overhead wires entering, at numerous points, the outer zone of the underground districts, which involves a construction of the language contained in Section 6, which exempts wires and other appliances ‘as may be **necessary** for reaching the places of business and residence at the terminals of underground wires.’

The contention set up by the corporation is that itself, and not the Department of Electricity, shall determine whether or not it is necessary to carry wires overhead to reach its

consumers' premises just within the restricted district, whether they be at the terminals of either aerial or underground lines.

Your valued opinion as to the Department's power in this matter is respectfully requested."

Opinion.

Section 6 of Ordinance No. 214 provides that "such terminal poles, wires and other appliances as may be necessary for reaching the places of business and residence at the terminal of underground wires shall be erected and maintained under the supervision and to the satisfaction of the Chief of the Department of Electricity."

It is thereby made the duty of the Chief of the Department of Electricity to supervise the erection of poles, wires and other appliances and to determine the necessity therefor.

Respectfully,

PERCY V. LONG,

City Attorney.

Chief of the Department of Electricity.

Right to Connect Street Railway Tracks at Intersection of North Line of California Street and Central Avenue— Construction of Orders Nos. 1926 and 2781.

August 19th, 1910.

Gentlemen: I am in receipt of your request for an opinion dated August 10th, which reads as follows:

"Mr. Black, Manager of the United Railroads, appeared before the Public Utilities Committee today, and presented the enclosed diagram asking, as is written out in pencil, permission to connect tracks as shown in dotted lines under franchises, granted as indicated, and I am directed by the Public Utilities Committee to refer this question to you, and to have

you render to them an opinion at your very earliest convenience, by Monday, if possible, as to what rights the United Railroads have to make these connections."

In reply would state as follows: The United Railroads claims, as the successor of W. H. Martin, et al., and also of Adolph Sutro, the franchises heretofore granted by the Board of Supervisors by and under Orders Nos. 1926 and 2781 respectively.

Order No. 1926, enacted in the year 1887, gave to W. H. Martin et al., the right "to construct, lay down, maintain and operate for the term of twenty-five years" from and after the date of its passage, "a single or double track street railroad, with all *the necessary and convenient* * * * switches, turnouts, turntables and appliances along and upon the following streets * * * , to-wit: Commencing at the intersection of Jackson Street and Central Avenue * * * ; thence along and upon Central Avenue to California Street."

Order No. 2781, enacted in the year 1894, gave to Adolph Sutro "the right to construct, lay down, maintain and operate for the term of 50 years," from and after its passage, "a single or double track street railroad with all the *necessary* side tracks, switches, turnouts * * * along and upon the following named streets, to-wit:

First. Commencing at the intersection of Geary Street and Central Avenue; thence along and upon Central Avenue to Washington Street." * * *

Second. * * *

Third. Commencing at the intersection of California Street and Central Avenue; thence along and upon California Street westerly to Maple Street."

Subsequent to its creation, however, the franchise to operate a street railway under said Order No. 2781 "commencing at the intersection of Central Avenue and the north line of California Avenue thence along Central Avenue northerly to Washington Street" was abandoned. (See Resolution of the Board of Supervisors No. 13055, Third Series.)

At present, therefore, Order No. 2781 gives only the right to operate a street railway.

First. Commencing at the intersection of Geary Street with Central Avenue; thence along and upon Central Avenue to the north line of California Street."

Second. * * *

Third. Commencing at the intersection of California Street and Central Avenue; thence along and upon California Street westerly to Maple Street."

The right of the United Railroads "to connect tracks," as outlined in your request for an opinion, must be traceable therefore to either or both said orders No. 1926 and No. 2781. Said right, however, is not expressly granted in either of said orders. That is to say, neither one of said orders expressly gives to the holders of the franchises therein respectively described the right to operate a street railway commencing at the intersection of Jackson Street and Central Avenue; thence along Central Avenue to California Street and *thence along* California Street westerly.

Order No. 1926 grants the right to operate a street railway along Central Avenue from Jackson Street to California Street, but it does not confer the right to operate along California Street westerly.

Order No. 2781 confers the right to operate a street railway, first along Central Avenue from Geary Street to the north line of California Street; third, along California Street west from Central Avenue, but it does not convey the right to operate along Central Avenue north of the north line of California Street.

The United Railroads is, however, now seeking to connect its tracks on Central Avenue north of California Street laid under said Order No. 1926 with its tracks on California Street west of Central Avenue laid under Order No. 2781.

This it can do on one theory and one theory only.

Order No. 1926 grants the right to construct "necessary or convenient switches or turnouts." This of course means

switches or turnouts necessary or convenient for the purpose of carrying out Order No. 1926.

Order No. 2781 gives the right to construct "necessary switches or turnouts." It omits the word "convenient" used in Order No. 1926. The grant of power is of course a grant to construct switches or turnouts necessary for the purpose of said Order No. 2781.

If, therefore, the work proposed to be done constitutes the construction of a switch or turnout necessary or convenient to the operation of a railway under said Order No. 1926, granting as it does the right to operate a railway along Central Avenue only to California Street, or necessary to the operation of a railway under said Order No. 2781 along Central Avenue west from California Street, then it can properly be done.

The mere fact that the same person may perchance hold the franchise to operate cars along California Street west from Central Avenue and the franchise to operate along Central Avenue north from California Street does not necessarily mean that said tracks existing under said distinct franchises may be connected.

The right to construct the tracks proposed to be constructed in this case must be created by either one of the orders hereinbefore referred to, considered separately. It does not necessarily arise merely from the fact that two separate franchises, different in character, happen to belong to the same person.

Inasmuch, however, as the facts and claims made by the United Railroads are not fully before us, we can simply present the following general suggestions:

If the work proposed to be done by the United Railroads is the construction of a switch or turnout necessary or convenient to the operation of a street railway under Order No. 1926 upon Central Avenue north from the north line of California Street, or if it is necessary for the operation of a street railway under Order No. 2781, then it may be done after a permit therefore is issued by the Board of Public Works.

If, however, the work is not the construction of such a switch, or even if it be the construction of such a switch, but such a

switch is not necessary or convenient under Order No. 1926 or necessary under Order No. 2781, then it cannot be done.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

City Streets Cannot Be Opened for the Laying of Pipes, Except for Supplying Fresh Water or Gas or Other Illuminating Light, Without a Permit from Board of Supervisors. Section 19, Article XI, Constitution, Construed.

August 25th. 1910.

Gentlemen: You have transmitted to me a communication addressed to your Board by the Equitable Light & Power Company in which the claim is made that that Company has the right to lay pipes in the streets of this City for the purpose of "supplying the inhabitants of the City and County with hot water and steam for heating purposes," without first obtaining from the Board of Supervisors a franchise or privilege therefor. Such right is claimed under the provisions of Section 19 of Article XI of the Constitution of California.

My opinion is requested as to whether or not the laying of pipes for the purposes above designated is within the purview of that section, which reads as follows:

"In any City where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections

therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The question presented is whether or not "hot water and steam for heating purposes" is included within the designation of "fresh water for domestic and all other purposes" as used in the Constitutional provision.

The above provision of the Constitution has been the subject of several adjudications by the Supreme Court of this State. These decisions have established the law to the effect that persons or corporations who come within the purview of this section have the right to lay pipes in the streets of California municipalities without interference by Boards of Supervisors, except in the one particular designated, viz: "under such general regulations as the municipality may prescribe for damages and indemnity for damages."

In re Johnston, 137 Cal. 119.

It has further been held that the section is broad enough to include within its provisions the placing of poles for electric light and power and the furnishing of gas for cooking and heating as well as for lighting. *Pereria vs. Wallace*, 129 Cal., 397; *Denninger vs. Recorder's Court*, 145 Cal., 639; *People vs. Los Angeles Ind. Gas Co.*, 150 Cal., 559.

These latter decisions are based upon the fact that the pipes and conduits there involved were partly used for a purpose which was admittedly within the provisions of the Constitution, viz, for supplying "gas light or other illuminating light"; and that their joint use for a purpose other than those particularly named in the Constitution did not affect the right procured by their use for the first purpose.

In no case has the question directly arisen as to whether or not the constitutional privilege extends to the supplying solely

of a public utility not expressly included within those designated in the Constitution.

There can be no question that a public service corporation has the right under the Constitution to lay pipes for the supplying of water, either hot or cold, to the public without obtaining a franchise or permit therefor. The supplying of steam alone would present, however, a different question.

The dictionaries define steam as "the elastic aeriform fluid into which water is converted when heated to the boiling point; water in the state of vapor." The first part of this definition has been adopted by the Supreme Court of Rhode Island in *Reynolds v. Washington Real Estate Co.* 23 R. I. 197; 49 Atl. Rep. 709.

Your letter and that of the Equitable Light & Power Company, which you enclose, both refer to the pipes involved in this matter as being laid for the purpose of supplying the inhabitants of the city and county with "hot water and steam for heating purposes."

You are advised that if both water and steam are furnished through the same pipes the corporation seeking to lay the same is within the provisions of the Constitution and has the right to lay such pipes without a franchise or permit from the Board of Supervisors.

I understand from your communication that these pipes are not used for the furnishing of steam alone. It is, therefore, not necessary to consider at this time the rights of a company which sought to lay pipes solely for that purpose.

Replying to the second inquiry in your communication as to the right of the Merchants' Ice and Cold Storage Company to open Sansome Street for purposes of running pipe lines from one portion of its property to its warehouses, you are advised that inasmuch as these pipes are to be used solely for private purposes the laying of the same is not within the provisions of the Constitution and that a permit, therefore, should be obtained from the Board of Supervisors. The Constitutional provision refers to persons and corporations engaged in the public business of supplying the city and its inhabitants with

light or water and confers no rights for the use of the streets for private purposes.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Board of Education Has Power to Correct Its Minutes so That the Same May Correctly State Its Proceedings.

September 1st, 1910.

Gentlemen: On the first of March, 1910, I advised you that in the case of Miss Charlotte Cerf, a resolution by the Board of Education, and not the form of its communication to the teacher by the Secretary of the Board, determines the status of a teacher in the School Department.

I am in receipt of yours of August 19th, 1910, as follows:

"I am directed by the Board of Education of the City and County of San Francisco to place before you the following facts relating to claim of Miss Charlotte Cerf, a teacher in the Polytechnic High School, and to respectfully request from you an opinion as to the action that should now be taken by the Board of Education:

Under date of March 1, 1910, the City Attorney wrote the Board of Education in the following terms:

'The passage of the Resolution by the Board of Education, referred to in your letter (Feb. 10, 1910), and which in terms employs Miss Charlotte Cerf as a teacher was a proper exercise of the power of the Board and is the only exercise of power which could be binding upon it. The Secretary in communicating a Resolution of this character to the teacher employed could not make any alteration in its terms which could affect the teacher's rights. The Secretary has no authority in such a matter and it is the Board of Education solely who can determine the terms of employment of a teacher in your Department.'

After the receipt of this opinion Miss Cerf through her attorney interviewed the men who had constituted the Board of Education in December, 1907, and obtained from each a signed statement confessing that the minutes relating to Miss Cerf's case and which had been approved by them at a subsequent meeting were in error and that the Secretary's letter was correct. In view of the Opinion submitted by you the Board of Education of 1910 did not feel warranted in allowing Miss Cerf's claim on the statement made by the previous Board members. * * *

I also have before me the following copy of the signed statement of Lawrence F. Walsh, Thomas F. Boyle, A. Altman and D. Oliver, Jr., who constituted the Board of Education of the City and County of San Francisco at the time of the passage of the resolution of the Board with reference to Miss Cerf. This statement is also signed by E. C. Leffingwell, formerly Secretary of said Board of Education.

"San Francisco, Cal., March 12, 1910.

"To the Board of Education of the
City and County of San Francisco,
State of California.

It has been brought to the attention of the undersigned, who constituted the Board of Education of the said City and County of San Francisco on December 19, 1907, that there is no record in the minutes of the Board of Education of the appointment of Miss Charlotte Cerf as a teacher in the San Francisco School Department; although we understand that the minutes show that she was *assigned* as a teacher to the Polytechnic High School.

Miss Cerf was appointed a teacher in the department and the facts are these (each having refreshed his memory by reading the letter of Mr. E. C. Leffingwell to Miss Cerf, dated December 21, 1907) :

Miss Cerf at the time of her appointment, had recently returned from Europe where she had pursued studies in French

and other subjects. Theretofore she had taught for several years and it was understood by us that she was contemplating taking a position as teacher of French in the Seattle Schools.

At a meeting of the Board of Education held prior to the time Mr. Leffingwell's letter was written, at which meeting all of the members of the Board were present, a resolution was properly adopted by the Board of Education by which Miss Cerf was appointed a regular teacher in the department and the period of probation was waived. The proper resolutions were adopted to accomplish this end. We feel confident that the resolution incorporated in Mr. Leffingwell's letter is correct. If the resolutions do not appear in the minutes, this omission is doubtless the result of some clerical error.

Respectfully,

(SIGNED) LAURENCE F. WALSH,
THOMAS F. BOYLE,
A. ALTMAN,
D. OLIVER, JR.,"

E. C. LEFFINGWELL,
Formerly Secretary of the
Board of Education.

These facts were not before me at the time of my opinion of March 1, 1910, the only question asked me at that time being as to whether a resolution as noted upon the minutes of the Board of Education would control over the report of that resolution made by the Secretary of the Board to the teacher interested and I advised that the minutes of the Board would, of course, govern.

If, however, it appears to your Board that the minutes themselves were in error, as indicated by the facts above set forth, then I advise you that it is within the power of your Board to order those minutes corrected in order that the minutes may correctly state just what happened with reference to this case.

I advise you that there is nothing contained in my opinion to you of March 1, 1910, which in any way would advise that your Board has not the power to order its minutes altered so

as to correctly state the proceedings, and to pay to Miss Cerf the salary claimed by her as a regular teacher in the Department.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

**Horse and Buggy Hired by Board of Health Struck by a
Train Through the Negligent Acts of Employees of the
Board, City Not Liable for Damages.**

September 16, 1910.

Gentlemen: I am in receipt of your communication as follows:

“Your attention is respectfully called to the attached copy of a resolution adopted by the Board of Health in meeting assembled on Friday, August 8th, 1910, requesting an opinion as to their liability for damages in the case of a horse killed and buggy damaged while being used on official business by an inspector of this Department.”

Accompanying the above letter was a copy of the resolution referred to, as follows:

“WHEREAS, the Board of Health has been presented by the Dexter Prince Stables, of 407 Baker Street, with a bill in the sum of One Hundred and Ninety-five (\$195.00) Dollars, which is in the nature of a claim for reimbursement for a horse killed and a buggy damaged while being used by an inspector of this Department, and

WHEREAS, the Board of Health as public servants are not informed as to the extent of their liability for said claim, therefore,

BE IT RESOLVED, That the City and County Attorney be requested to render an opinion as to the legal status of this

claim, and particularly with reference as to whether this Department is liable for damages of this character."

My understanding of this matter is that the Board of Health has made it a custom to hire such horses and buggies as are necessary for traveling purposes for its regularly appointed inspectors and that one of your inspectors, regularly appointed by your Board as an inspector of vegetable gardens, in so using a horse and buggy so hired by the Board of Health did tie the horse to a hitching post while he was performing his duties as such inspector, and that the horse and buggy were run down by a train and the horse killed and the buggy damaged; and that you wish to be advised as to the liability of the City and County for the resulting damages to the owners of this horse and buggy, it being of course assumed that the accident happened as the result of the negligence of the inspector in tying the horse as he did.

I understand that the hiring of this horse and buggy was done solely by your Board, and the inspector was directed in the performance of his duties, solely by your Board, the money to pay for this hiring being obtained from the annual fund provided in the budget by the Board of Supervisors, for the purpose of covering the general necessary expenses of the Board of Health.

Opinion.

The rule which governs in such a case as this is, that when an official or agent of the City and County, in the performance of his official duties and representing the City in its governmental capacity, so acts as to cause, by his negligence, damages to some other person, and this action is not directed by the City and County itself, that then the liability for damages cannot rest upon the City and County.

The rule is stated by the Supreme Court of this State in the case of *Davoust vs. City of Alameda*, 149 Cal. at page 70, as follows:

After citing some decisions by our Supreme Court, the Court says:

“These cases undoubtedly establish the rule in this State, although it has been held differently in some other jurisdictions, that a municipal corporation, when exercising governmental functions as an agent of the sovereign power, is not liable for damages caused by the negligence of its employees, unless it is expressly so made liable by statute.”

And at page 75 Mr. Justice Shaw in his concurring opinion says:

The rule is well established in this State that, in the absence of a statutory provision permitting it, an action will not lie against a municipal corporation for damages caused by the negligence of its officers, agents, and servants in the performance of the public or governmental duties of such corporation.”

There being no statutory provision making the City liable for damages in such a case as you have submitted to me, you are therefore advised that the City and County of San Francisco cannot be held responsible in law for the damages inflicted because of the negligence of your inspector.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Health.

Board of Supervisors Are Without Power to Grant a Street Railway Franchise Without a Condition That Mail Carriers, While on Duty, May Ride Free of Charge.

September 17th, 1910.

Gentlemen: I am in receipt of your communication of September 2nd, which reads as follows:

“I am instructed by the Public Utilities Committee of the Board of Supervisors to request your opinion as to whether or not the Board of Supervisors in granting a street railway

franchise must include as one of its provisions a stipulation to allow mail carriers in the employ of the United States, while on duty, to ride on their cars without paying fare."

Section 1 of the Act of Legislature of February 27th, 1893, (Stats. 1893, p. 44) reads as follows:

"In all cases hereafter, where application is made to the city, city and county, or town authorities, or to the trustees, council, or other body to whom it is intrusted, the government of the city, city and county, or town, for permission and authority to lay railroad tracks through streets or public highways of any incorporated city, city and county, or town, such authorities, before granting such permission and authority, in addition to the terms and restrictions which they are now, by law, authorized to impose, must exact and require from the persons or corporation asking or seeking such permission and authority, a satisfactory promise and undertaking to permit and allow mail carriers in the employ of the United States government, at all times, while engaged in the actual discharge of duty, to ride on the cars of such railroad without paying any sum of money whatever for fare or otherwise. And such governing body of city, city and county, or town authorities must make such promise and undertaking on the part of such persons or corporations a condition precedent to the granting of such permission and authority to lay railroad tracks through streets or public highways of such city, city and county, or town; provided, that all such permissions and franchises shall be subject to all other provisions of the laws of this State applicable to street railroads in general and subject to regulations from city, city and county, and town authorities."

No language could be clearer than that of the section above quoted. It provides that "before granting such permission and authority" the city and county authorities "must exact and require the persons or corporations asking or seeking such permission and authority, a satisfactory promise, etc."

The only question remaining is whether or not the statute applies to franchises granted by the City and County of San

Francisco. It is to be assumed that the Charter controls the granting of street railway franchises and that whenever the provisions of the Charter are found to be in conflict with the State statutes in this respect the latter must give way. That is to say, that the granting of street railway franchises is a municipal affair which may be regulated by the Charter in accordance with the provisions of Section 6 of Article XI of the Constitution.

However, when the Charter is silent on a matter which is conceded to be a municipal affair it is entirely proper for the legislature to make general regulations applicable to all cities of a designated class and when this is done such regulations apply to and are binding upon such municipality until it shall, by Charter, defeat the operation of the statute. (See *Nicholl v. Koster*, 39 Cal. Dec. p. 263, March 28, 1910.)

Our Charter is silent upon the matters contained in this statute and I am of the opinion that it must, therefore, be taken as an additional condition to be imposed in the granting of the franchise and that your Board is without power to grant a franchise until this condition has been complied with.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

A Woman, Who Is a Citizen and Sole Trader, Is Granted a Retail Liquor Permit. Her Subsequent Marriage to an Alien Does Not Forfeit Her Permit.

September 17th, 1910.

Gentlemen: I am in receipt for your request for an opinion which reads as follows:

“Ramon De Garcia, a citizen of the United States, formerly held a Retail Liquor Permit to conduct a saloon at 717 Vallejo Street in this City and County. While conducting said place

he became insane and was committed to one of the asylums and was confined there until the time of his death.

While an inmate of the asylum his wife became a sole trader, and this Board granted a Retail Liquor Permit for the said premises in her name being the wife of a citizen and a sole trader.

After the death of De Garcia she married one, L. Laes, an alien, a Retail Liquor Permit for the said premises still being in her former name, Mrs. Rosorio De Garcia.

What we desire to be informed upon is whether or not she is now entitled to a Retail Liquor Permit in view of the fact she has become the wife of an alien."

Opinion.

Assuming that the applicant for the permit was legally constituted a sole trader as required by law, she then became entitled to a permit to sell intoxicating liquors in her own right notwithstanding the condition of her husband; she was then a citizen and her status in this respect has not been changed by her subsequent marriage to her present husband.

Though the wife follows the domicile of her husband and would become an alien if, having married an alien she should depart from the territory of the United States and acquire with her husband a residence in a foreign country, she does not lose her citizenship when she merely marries a resident alien or non-citizen.

You are therefore advised that the applicant has not lost any right to a continuance of her permit by her marriage as set forth in your communication.

PERCY V. LONG,
City Attorney

Board of Police Commissioners.

**Permits for the Erection of Steam Boilers Being Revocable
at the Pleasure of the Board of Supervisors, the Reasons
for Revocation Need Only Be Satisfactory to the Board.**

September 20th, 1910.

Gentlemen: I am in receipt of your communication of the 4th inst., as follows:

"I have been instructed by the Fire Committee of the Board of Supervisors to request you to furnish said Committee with an opinion as to its rights and powers to regulate or close a laundry being operated under the following conditions:

The laundry in question was opened prior to the passage of the present laundry ordinance and at a time when a permit was not required to conduct said business. The owners, however, secured an engine and boiler permit, the same being required by another ordinance. Protest has been filed against the operation of the laundry on the alleged grounds that it is insanitary and in addition is a menace to the safety of the neighborhood. The Board of Supervisors is asked to order the laundry discontinued as an alleged nuisance. Under the circumstances, has the Board the legal right to close said laundry by revoking the engine and boiler permit, because of the alleged insanitary condition of the premises, or is the matter one that properly should be adjudicated by the courts?"

Opinion.

Ordinance No. 1023, approved October 27th, 1903, entitled "Regulating the erection, maintenance and use of steam engines and boilers and steam boilers" gives the power to the Board of Supervisors to issue permits to any person, firm or corporation to erect or to maintain or use any steam engine and boiler or steam boiler.

Section 3 provides that said permits may be revoked *at the pleasure* of the Board of Supervisors. Having the power, under the Ordinance to revoke said permits at its pleasure the Board may exercise that power at any time without being com-

pelled to assign a reason therefor, it being only necessary that the reason for the revocation of said permit appear sufficient to the Board of Supervisors.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Claim of E. R. Zion for \$51 for Posting and Serving Certain
Tax Notices Is Valid.**

September 20th, 1910.

Dear Sir: I am in receipt of your communication of the 13th inst. as follows:

“With reference to the enclosed claim of E. R. Zion, in sum of \$51.00, for serving and posting to the parties named therein notices of the State’s intention to apply for tax deeds, which amount is claimed under Section 3785a of the Penal Code, I am directed by the Finance Committee of the Board of Supervisors to enquire of you whether or not the payment of said claim is compulsory upon the Board of Supervisors.

Kindly also inform me whether Mr. Zion, in the discharge of such duties, should have notified the City and County of the State’s intention in regard to parcel of land situate at the intersection of the southerly line of Lobos Street with the westerly line of Capitol Avenue, recently purchased as an additional site for the Sheridan Primary School, about which the undersigned wrote your office under date of August 31st, 1910, and whether his failure to do so would affect the claim in question.”

Opinion.

Under Section 3785a of the Political Code, added by Statutes 1909, p. 456, the Tax Collector of a county or city and county in which any real property which was assessed and sold to the State prior to March 28th, 1895, for delinquent

State and county taxes, and where no redemption of said real property has since been made, is designated, appointed and selected to represent the State of California, for the purposes mentioned in said section, and the said Tax Collector is also authorized and empowered to appoint some competent person, who is a citizen of the United States and over the age of eighteen years to act in his place and stead, who shall, when appointed, have full power to represent the State of California for the purposes in said section mentioned.

The Tax Collector or the person appointed by him, is authorized and empowered on behalf of the State, and as its agent, upon the written authorization of the State Controller to any Tax Collector to serve any and all notices upon the owner and owners of any and all property purchased and which was sold to the State prior to March 28th, 1895, for delinquent State and county taxes and upon any and all other persons as may be necessary, and to post and publish any and all notices, and make any and all affidavits, and do any and all acts and things of whatsoever kind and nature, which may be necessary, or which were required or necessary to be done under the laws in force at the time of the sale of said real property for delinquent taxes, so that the State may receive a valid and proper deed to such real property.

Paragraph 2 of said Section provides:

“The said person so serving any notice as above referred to, shall be entitled to receive the sum of three dollars for the service of said notice and the making of said affidavit, which is hereby made a charge against the county wherein the said real property is situated and also a reasonable amount for costs of publication, when necessary, which shall be a county charge and shall be paid by the said county to such person and which said sum shall be paid by the redemptioner, if redemption be made as provided by the law in force at the time said sale was made. * * * ”

I will assume for the purposes of this opinion that the Tax Collector of the City and County of San Francisco was duly authorized by the State Controller of the State of California

to serve the notices mentioned in your communication and also appearing in the claim of E. R. Zion, attached thereto, and also that the Tax Collector duly appointed said E. R. Zion. The liability of the City and County of San Francisco to pay for the services rendered by the claimant as evidenced and set out in his sworn claim is fixed by the section above quoted and you are advised that the same is a valid claim against the City and County and will have to be paid.

In answer to your second question, I will say that the claim of E. R. Zion is not affected by the failure, if failure there was, to notify the City and County of the State's intention toward the real property mentioned; moreover there is no showing that E. R. Zion was charged with any duty in respect thereto.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Status of Randall Street, Between Chenery and Mission Streets.

September 21st, 1910.

Gentlemen: I am in receipt of your request for an opinion dated September 6th, which reads as follows:

"I have been directed by the Committee on Streets, Sewers and Parks of the Board of Supervisors, to refer to you the question of an alleged obstruction of the roadway of Randall Street between Chenery and Mission Streets, with the request that you advise the Committee as to the proper legal steps to be taken in the matter, to the end that said obstructions may be removed should it be found by you that they are on a public thoroughfare."

Opinion.

The question of whether or not Randall Street between Chenery and Mission Streets is an open public street was sub-

mitted to the office heretofore and answered in the communication from Hon. Franklin K. Lane, the then City Attorney, of date February 9th, 1899, as follows:

"I am in receipt of Resolution No. 2269 (Fourth Series), requesting my opinion as to whether or not Randall Street, between Chenery and Mission Streets, is an open public street of a uniform width, and beg to reply as follows:

On a map of "Fairmont" surveyed in 1862 by the City Surveyor and recorded at the request of R. H. Sinton and C. C. Webb, March 12th, 1864, Randall Street runs from Palmer Street to San Jose Avenue. In 1864 one H. G. Livermore conveyed by deed a portion of the "Fairmont" Tract to the "Fairmont Homestead Association." In this deed reference is made to the "Fairmont" map and Randall Street is referred to as the southerly line of the property conveyed.

On the map of the "Fairmont Homestead Association" filed by the secretary of the association March 13th, 1865, Randall Street runs from Palmer Street to Chenery Street, the latter street being the easterly line of the association tract.

On the map of the "Fairmont Land Association" adopted by the association June 19th, 1871, and filed at the request of Wm. Stuart, secretary of the association, August 5th, 1871, Randall Street runs from Palmer Street to San Jose Avenue.

There is no record of a dedication of Randall Street by deed to the City, so far as can be determined without an abstract of title to the land in question, or by recorded map other than as above set forth, nor is it named in the official list of accepted streets.

On neither of the maps above mentioned does Randall Street extend further easterly than San Jose Avenue, which seems to be the easterly line of "Fairmont."

Old surveys and records, official and private, indicate that for a long term of years, dating back to a time prior to 1870, a street at or about the location of the present traveled roadway between Mission and Chenery Streets, known as Randall Street, was open and traveled by the public.

On the "Board of Engineers Map" of 1866 and on the "Humphrey's Map" of 1870, Randall Street of the "Fairmont Tract" has been produced easterly in a straight line extended to Mission Street.

In *Whelan vs. Boyd* (93 Cal. 500), it was held that a strip of land was not conclusively proved to be a street because it was laid down as such upon what is called the "Engineers Map" and the "Humphrey's Map" of the City and County of San Francisco. (Approved in *Schmitt vs. San Francisco*, 100 Cal. 302.)

On the south side of Randall Street, thus extended to Mission Street, between San Jose Avenue and Mission Street, a portion of the roadway is enclosed and occupied by one John F. Kennedy, and has been so enclosed and occupied for a period of years. This land has never been assessed to said Kennedy.

In the absence of a complete abstract of title I am unable to state positively whether any portion of Randall Street has been dedicated to the city, and duly accepted. And as to that portion of Randall Street east of San Jose Avenue, I am inclined to the belief, from the investigation already made, that not even the examination of an abstract would solve the question. It is probable that as to that portion of the street the question will prove to be one of actual fact, as to whether the street has been used as a public highway by the public to such an extent as to amount to a dedication by virtue of user. The determination of this question would involve the taking of testimony."

Nothing appears of record since that time to cause me to dissent from that opinion, and I must concur therewith and advise you in accordance with the same.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**The Word Vehicle Has Been Held to Include Bicycle and Is
Believed to Include Automobile.**

September 21st, 1910.

Gentlemen: I am in receipt of your request for an opinion, which reads as follows:

"I am directed by the Board of Supervisors to request your opinion as to whether an automobile would come within the meaning of the word "vehicle" as used in Ordinance No. 445 (page 588, General Ordinances of the City and County of San Francisco), the first section of which reads as follows:

'No livery stable keeper or bailee to whom the care, custody or control of any horse or vehicle is entrusted, shall use or permit to be used said horse or vehicle by any other than the person entrusting said horse or vehicle to said livery stable keeper or bailee.'

Complaint has been made to the Board that persons in whose custody automobiles have been left, have been guilty of permitting others than those so leaving said automobiles to use them. The parties aggrieved have enquired whether or not action can be taken under the provisions of this Ordinance."

Opinion.

Ordinance No. 445 to which you refer is entitled "Prohibiting the use by livery stable keepers *and others* of horses *or vehicles* entrusted to their care."

Section 1 of this Ordinance refers to any "livery stable keeper or bailee to whom the care, custody or control of any horse or vehicle is entrusted."

It will thus appear that the language both of the title and the body of the Ordinance is very general. The words "and others" in the title and "bailee" in the body of the Act may be construed to include those who might have had placed in their custody *vehicles* other than buggies, etc., which may be used with horses, while the words "livery stable keepers"

would include those who have had in their custody horses, buggies, wagons, etc.

The word "vehicle" is defined in "Webster's International Dictionary" as follows: "That in or on which any person or thing is, or may be, carried, as a coach, carriage, wagon, cart, car, sleigh, *bicycle*, etc."

And in the Standard Dictionary it is defined: "Specifically, in law, any artificial contrivance used or capable of being used, as a means of transportation on land."

In the case of *State v. Collins*, 17 Atlantic, 131, a bicycle was held by the Supreme Court of Rhode Island to be "a carriage or vehicle" within the terms of a statute which enacted that "every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road."

It would seem that if the word "vehicle" may be construed by the courts as including a bicycle, as above, that it may very well be construed as including an automobile within the terms of Ordinance No. 445, and you are therefore advised that the parties aggrieved, as described in your communication, may take advantage of the provisions of this Ordinance. However, if the purpose of your inquiry is to decide whether a new ordinance should be drafted to cover specifically the matter suggested by the complaining parties, I can see no reason why such an Ordinance should not be passed.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Overhead Wires Cannot Lawfully Be Maintained in Districts
Nos. 1, 2, 3, 4 and 5.**

September 23rd, 1910.

Gentlemen: I am in receipt of your request for an opinion dated July 9th, 1910, which read as follows:

“Pursuant to direction of the Electricity Committee of the Board of Supervisors, I am transmitting you herewith, copies of permits granted to various messenger companies operating in the City and under which they are erecting overhead wires for the transmission of messages. You are respectfully requested to inform the committee as to what rights the permittees enjoy under the permits so granted, also to advise whether or not the granting of such permits lies within the powers of the Board of Supervisors.”

Opinion.

Order No. 214, approved August 23rd, 1899 entitled “Providing for placing electrical wires and conductors underground in the City and County of San Francisco,” provided generally for the division of the city and county into four underground districts, within the limits of which districts, as specified therein, it should be unlawful, after the dates fixed by Section 2, for any electric light, electric power, telegraph, telephone or other electric companies or any corporation, partnership or individual to erect, maintain, continue, use, operate or employ any pole or overhead wires and that such poles or overhead wires should be, at and after the time specified for each of the respective districts, deemed and become public nuisances, except such as were exempted from the provisions of the Order, and Section 6 of the Order exempted overhead wires used for district telegraph and messenger services.

Under Order No. 214, as it stood at that time, Resolutions Nos. 332, 378 and 821, copies of which accompanied your request for this opinion, were passed by the Board of Supervisors.

Thereafter Ordinance No. 1473, in effect May 1st, 1905, was adopted amending Order No. 214. Said ordinance repealed the exemption clause relating to district telegraph and messenger service companies contained in Section 6 of the order as originally adopted, but provided, in Section 2 of said Ordinance No. 1473, that it should be unlawful after the 1st day of May, 1906, for any district telegraph and messenger service company, or any corporation, copartnership or individual to erect or maintain any overhead wires connected from building to buildings, or otherwise, and not on poles.

Thereafter Ordinance No. 789 (New Series), in effect June 9th, 1909, was adopted, which added two new underground districts, viz, District No. 5 and District No. 6. It also extended the time for the maintenance of overhead wires by district telegraph, messenger service companies or any corporation or partnership or individual in the various districts enumerated therein, as follows: in Districts 1, 2, 3 and 4, until May 10th, 1909; in District 5, until December 31st, 1909, and in District 6, until December 31st, 1910. This is the last legislative action taken by the Board of Supervisors on this subject.

It appears from the foregoing that the only district in which wires may be maintained is District 6, and therein only to December 31st, 1910, and in Districts 1, 2, 3, 4 and 5 the period within which wires might be maintained has expired. If the messenger companies mentioned in the permits accompanying your communication are operating in Districts 1, 2, 3, 4 and 5 they are doing so unlawfully and in violation of the express terms of Order 214, as amended by Ordinance 789 (New Series), and Section 4 of said Order 214 empowers the Chief of the Department of Electricity, at the time specified aforesaid, for each of the respective districts, to at once take down, remove and carry away any and all such poles, overhead wires, devices and apparatus as may not have been previously removed by the owners or operators thereof as required by the provisions of said order, and said Chief is expressly given full power and authority to use and employ for that purpose as

much force as may be necessary to effectually carry out the provisions of said Order and that power may be exercised at any time after the expiration of said specified time.

It will be seen that Districts 1, 2, 3, 4 and 5 are thereby eliminated from consideration, for it is to be presumed that the Chief of the Department of Electricity has complied with said Order and has exercised the power thereby vested in him, leaving for consideration District No. 6.

Section 2 of the order allows wires to be maintained in District No. 6 until December 31st, 1910, after which time it shall be unlawful for any district telegraph or messenger service company to maintain wires therein. That being so it follows that the right to maintain said wires cannot be taken away except by an amendment to said Order No. 214.

You are therefore advised, categorically answering your questions, that no rights exist in the permittees under said permits, or otherwise, to maintain any wires in Districts 1, 2, 3, 4 and 5; that in District No. 6 the right to maintain such wires can be taken away from the permittees only by an amendment, as suggested above; that under Section 2, Chapter II, Article II of the Charter, the granting of such permits in conformity with the terms of Order No. 214 is within the powers of the Board of Supervisors, for the reason that in said section the Board of Supervisors shall have power "except as otherwise provided in this Charter, or in the Constitution of the State of California, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the city and county."

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Upon the Failure of Shrader Bros. to Comply with Their Contract, City May Look to Their Bondsman. New Contracts May Be Let.

September 24th, 1910.

Gentlemen: I am in receipt of your communication of the 22nd inst., in regard to the failure of Shrader Bros., to furnish supplies in compliance with their contract entered into with the City and County of San Francisco on the 1st day of July, 1910. You ask to be advised as to what course you should pursue under the circumstances.

Opinion.

Upon the failure of Shrader Bros., to comply with their contract the City is entitled to look to the American Bonding Company for all damage that may be occasioned to the City and County by reason of such failure. The first step that should be taken is to notify Shrader Bros., and the American Bonding Company that by reason of their failure to furnish these supplies the City and County will be obliged to purchase the supplies from other persons and that the City and County will hold Shrader Bros., and the American Bonding Company responsible for all damages that may be occasioned by the breach of the contract. This should be done by resolution of the Board of Supervisors. The Board of Supervisors should, as soon as practicable, advertise for a new contract for the supplies covered by the contract with Shrader Bros., following the method provided in the Charter for the letting of such a contract. The amount of supplies that should be contracted for in the new contract should be the total amount of supplies that was agreed to be furnished by Shrader Bros., less the amount that has actually been furnished by Shrader Bros., and the amount that has been purchased in the open market pending the letting of a new contract. It is, of course, necessary to purchase supplies while the proceedings for the letting of a new contract are pending. This the Board of Supervisors is justified in doing. All supplies purchased should

be purchased at the lowest market price and in the open market.

A careful account should be kept of all supplies purchased in the open market for the reason that the City and County will be entitled to recover from the bonding company and Shrader Bros., the difference between what the City and County would have paid for the supplies under the Shrader Bros., contract and what the City and County has been forced to pay by reason of Shrader Bros., failure. At the end of the year for which the contract with Shrader Bros. runs, the City and County will be entitled to bring suit against Shrader Bros., and the American Bonding Company for that damage, including the expense of letting a new contract.

Copies of all resolutions and actions by the Board of Supervisors in letting a new contract should be served upon both Shrader Bros. and the American Bonding Company. If the foregoing suggestions are followed all rights of the City and County will be preserved.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Charter Election—Amendments—Effect Upon Other Amendments of Striking Out a Proposed Amendment.

September 28th, 1910.

Gentlemen: I am in receipt of your communication of September 27th, in which you ask to be advised as to the power of the Board to adopt, at this time, a resolution rescinding a certain proposal to the electors of the City and County for the amendment of the Charter, which proposal was designated as "Amendment No. 26". The purpose of such resolution is to withdraw from consideration of the electors such proposal.

The proposed amendment No. 26 was ordered submitted to the electors by vote of the Board of Supervisors on August 31, 1910, and publication thereof was commenced in the official paper on the 10th day of September, 1910. Subsequently, and on the 19th day of September, 1910, the Board of Supervisors finally passed Ordinance No. 1301 (New Series) calling and ordering the special election to be held on the 15th day of November, 1910, for the purpose of submitting to the electors propositions to amend the Charter of the City and County. The ordinance was approved by the Mayor on September 20th and published as required by law.

In Ordinance No. 1301 (New Series) Charter Amendment No. 26 was included as one of those directed to be placed upon the ballot at the special election.

The question upon which you desire to be advised is not so much the power of the Board to withdraw such proposed amendment from the consideration of the electors as it is whether such act will affect the validity of other amendments which are to be submitted at such election.

Section 8 of Article XI of the Constitution, providing for the adoption and amendment of municipal charters, reads in part as follows:

“The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the Legislature, as herein provided, for the approval of the charter.”

It will be observed that there is nothing in the Constitution specifying the time at which the ordinance calling the election must be passed. Such being the case, it is not necessary that such election shall be called before the publication

of the proposed charter amendments commenced or before such publication is completed.

The proposal of the Supervisors to submit the amendment and the ordinance calling and providing for the special election are two separate acts. The power granted to the Supervisors to submit the charter amendments in the first place includes the power to rescind and withdraw the submission. Therefore, as far as the amendment itself is concerned, your Board has full power to pass the rescinding resolution in the form submitted.

Without an amendment of Ordinance No. 1301 (New Series) the Board of Election Commissioners has no other authorization for the preparation of the ballot than that contained in such ordinance. In compliance with such ordinance it will, therefore, be necessary for the Board to prepare the ballot as specified in that ordinance.

The submission of Amendment No. 26, therefore, would be an idle act and if such proposed amendment is approved by the electors it would be of no value. Such procedure, of course, could not affect the validity of the other amendments proposed. While, on the other hand, if the Election Commissioners should omit such proposal from the ballot the question might be raised that the ballot was not in the form prescribed by the Board of Supervisors in the ordinance calling the election.

However, it is within the power of your Board to amend Ordinance No. 1301 (New Series) by striking out therefrom all reference to the proposed charter amendment No. 26, provided that a reasonable notice of the election is given.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Ocean Shore Railway Company Not a Street Railway Company in the Sense of Section 499 C. C.

September 30th, 1910.

Gentlemen: I am in receipt of your communication of September 27th, enclosing a proposed ordinance granting to the Ocean Shore Railway Company an extension of the time within which the work must be completed under the franchise granted by Ordinance No. 1623.

You ask to be advised as to what right the City would have to operate the Geary Street car over the lines of the Ocean Shore Railway Company on "C" Street if this ordinance is adopted.

The Ocean Shore Railway Company is not a street railway company such as is contemplated by Section 499 of the Civil Code and is, therefore, not within the limitations of that section, nor is it subject to the provisions of Subdivision 27 of Section 1 of Chapter II of Article II of the Charter. The only limitation upon the joint use of railway tracks is that contained in the sections of the Code and Charter above noted, and such limitations refer only to street railways.

However, if it is the desire of the City to use the tracks of the Ocean Shore Railway Company it will be necessary for the parties either to agree upon such joint use or for the City to condemn the right to use the same tracks.

In order to prevent any uncertainty as to the right of the City in this respect I submit herewith a proposed agreement to be signed by the Ocean Shore Railway Company and the officers of the City upon the approval of the ordinance.

As there may be some ambiguity as to the time allowed by the proposed ordinance for the completion of the work, I also enclose suggested changes to Section 7 to make this absolutely clear.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Stevenson Street, 120 Feet Southwesterly from Eighth Street,
a Public Street.**

October 6th, 1910.

Gentlemen: I am in receipt of your communication dated August 25, 1910, as follows:

"The Board of Public Works, by Resolution No. 6536, Second Series, passed August 24, 1910, requests it to be advised as to whether or not Stevenson Street, running southwesterly from the southwesterly line of Eighth Street for a distance of one hundred and twenty (120) feet and having a uniform width of thirty-five (35) feet, is a public street."

Opinion.

Stevenson Street, in 100 Vara Lot No. 284, is described as follows:

"Commencing at a point on the southwesterly line of Eighth Street, distant thereon one hundred and seventy (170) feet southeasterly from the southeasterly line of Market Street; running thence southeasterly and along said southwesterly line of Eighth Street thirty-five (35) feet; thence at right angles southwesterly one hundred and twenty (120) feet; thence at right angles northwesterly thirty-five (35) feet and thence at right angles northeasterly one hundred and twenty (120) feet to the southwesterly line of Eighth Street and the point of commencement. Being a part of 100 Vara Lot No. 284.

The whole of 100 Vara Lot No. 284 was conveyed to Charles V. Gillespie by John W. Geary, 1st Alcalde of San Francisco, by deed, dated November 28, 1849, recorded in Records for Town Lots, sold in November, 1849, in Book 2 on page 190.

By mesne conveyances, Lot No. 284 became vested in William Martin, who, by deed of gift to Catherine M. Martin, dated May 26, 1875, recorded January 7, 1887, in Liber 1218 of Deeds, page 304, offered Stevenson Street as described

above, for dedication as a public street, and the dedication was accepted by the adoption of the Humphreys and Tilton Official Maps of the City and County.

You are therefore advised that Stevenson Street, as described above, is a public street of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

City Liable for Its Portion of Street Work in Front of Bernal Park.

October 6th, 1910.

Gentlemen: I am in receipt of your communication of September 21st as follows:

“I am directed by the Committee on Streets, Sewers and Parks of the Board of Supervisors to request you to advise said Committee whether or not the Board of Supervisors can repeal Order No. 2521, approved April 19th, 1892, a copy of which is herewith enclosed wherein and whereby the property owners were required to keep in order the roadways and sidewalks on either side of Bernal Park.”

Opinion.

Order No. 2521, entitled, “Dedicating a portion of Precita Place between Folsom street and Columbus Place of the width of 120 feet being 60 feet on either side of the center line thereof, as a park of the City and County of San Francisco,” was passed by the Board of Supervisors April 18, 1892, and approved by the Mayor April 19, 1892. At the time of the adoption thereof the so-called Vrooman Act was in force. That Act was entitled “An Act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks and

for the construction of sewers within municipalities," as amended on March 31, 1891, statutes of 1891, page 196, Section 7 of the amendatory Act provides:

Sec. 7, Sub. 9. "Section one of Chapter three hundred and twenty-five of the laws of this State, entitled, "An Act amendatory and supplementary to 'An Act to provide revenue for the support of the government of this State,' approved April twenty-ninth, eighteen hundred and fifty-seven," approved April nineteenth, eighteen hundred and fifty-nine, shall not be applicable to the provisions of this section; but the property herein mentioned shall be subject to the provisions of this Act, and be assessed for work done under the provisions of this section."

Section 1 of the Act entitled "An Act amendatory of and supplementary to 'An Act to provide revenue for the support of the government of this State,' approved April 29th, 1857,"—approved April 19, 1859, provides as follows:

Sec. 1. Section second of an Act entitled to provide revenue for the support of the government of this State, approved April 28th, 1857, is hereby amended so as to read as follows:

Section second: "All property of every kind and nature whatever within this State shall be subject to taxation except * * *.

Sub. 2nd. * * * * All squares and lots kept open for health and public use or for ornament belonging to any county, city, town, or village in this State."

From the foregoing it appears that all squares belonging to any county, etc., were, by the provisions of subdivision 9, section 7, of the Act of 1891, amendatory of the Act of 1885, as aforesaid, made subject to the provisions of the said Act of 1891, and by said Act were made assessable for work done under the provisions of said section 7 of said Act of 1891. Order No. 2521, after dedicating "Bernal Park" provides, in section 2 thereof, that the roadways and sidewalks on

either side of said Bernal Park shall be, to their entire width, kept in order by the owners of property fronting thereon. If it was the intention of the Board of Supervisors to relieve the City of the responsibility for payment of its portion of the street work surrounding said Bernal Park, then that part of said Order 2521 is void and unconstitutional under the provisions of Section 11, Article II of the Constitution of the State of California, which provides:

“Sec. 11. Any county, city, town or township may make or enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws”, for the reason that the Act approved April 19th, 1859, amendatory of the Act of 1885, was a general law and so much of Order No. 2521 as provides for the doing of the work therein specified by the owners of property fronting on said Bernal Park is in conflict therewith. The statute providing for street improvements must be strictly followed, or no lien attaches to the property assessed.

In the case of *Ryan vs. Altschul*, 103 Cal., at page 175, the Supreme Court says:

“The effect of a street assessment is to put a burden upon a property holder against his will. No such lien can be put upon his property save by a substantial compliance with all of the provisions of the Statute and in no way can a burden be put upon him against the provisions of the statute.”

And again at page 178 it says:

“It appears upon the face of the previous assessment that the lot of the defendant is charged with a portion of the expense for the work done that the statutes declare must be assessed upon all lots, which cannot, under any circumstances be imposed upon the lot of the defendant; it must therefore be regarded as invalid for any purpose.”

And the invalid portion of said Order No. 2521, was not ratified, confirmed or continued in force by the adoption of

the Charter of the City and County of San Francisco. To that effect I will cite the case of *Bostock vs. Sams*, in the 93rd Am. State Reports at page 394, reading from the syllabus:

“A new charter continuing in force until repealed, all existing ordinances does not validate ordinances which the municipality had not the power to enact.” (Page 403.)

The Charter of the City and County of San Francisco provides in Section 8, Chapter II, Article VI, as follows:

“The expense of all work and improvement done upon any part of said streets, lanes, alleys, places or courts, under the order of the Supervisors, shall be borne and paid for as follows:

First: The City and County shall pay out of the General Fund the expenses:

b. Of all work done in front of or that may be assessed to, property owned by the City and County or by any department thereof.”

The City and County having assumed the liability for the payment of all work done in front of, or that may be assessed to the property owned by the City and County or by any department thereof, it cannot by Ordinance escape that liability, the Supervisors having no power or authority to either repeal or amend any section of the Charter by Ordinance. In so far as Order No. 2521 conflicts with the provisions of the Charter it is invalid under section 28, Miscellaneous, of the Charter which provides:

“All ordinances, orders and resolutions of the Supervisors of the City and County in force at the time this Charter takes effect, and not inconsistent therewith, shall continue in force until amended or repealed.”

Answering the specific question contained in your communication as to whether or not the Board of Supervisors can repeal Order No. 2521, you are advised as follows:

The repeal of the Order would be, in effect, a revocation of the dedication of Bernal Park. Such action might have been

taken before the acceptance by the people of the dedication of Bernal Park, as a public park of the City and County. The people by the adoption of the Charter have accepted the dedication of all parks and squares, including Bernal Park, in the City and County, and placed them under the sole and exclusive jurisdiction and control of the Park Commissioners by virtue of Section 1, Article XIV of the Charter which provides:

“The lands designated upon the Map of the Outside Lands of the City and County, made pursuant to Order No. 800, by the word ‘Park,’ extending from Stanyan Street to the Pacific Ocean, and known as Golden Gate Park; also the land fronting on Haight Street, designated on said Map by the word ‘Park,’ and known as Buena Vista Park; also the lands designated on said Map by the word ‘Avenue,’ extending from Baker street westward until it crosses Stanyan street; also that certain highway bounded on the west by the Pacific Ocean, and designated upon said map as “Great Highway”; also Mountain Lake Park; also Seal Rocks, as ceded to the City and County of San Francisco by act of Congress; and all other parks and squares in the City and County, and all the grounds surrounding public buildings in the City and County, and all parks and squares and pleasure grounds hereafter acquired by the City and County, shall be under the exclusive management of the Board of Commissioners, who shall be known and designated as Park Commissioners, except that children’s playgrounds and recreation centers outside of Golden Gate Park shall, to the extent of their use as such playgrounds and recreation centers, be under the exclusive management and control of the Playground Commissioners.”

The repeal of said Order by the Supervisors would be a futile act, for, while the Board has the undoubted power to repeal Ordinances, it cannot destroy the present status of Bernal Park, and remove it from the list of duly dedicated and accepted parks of the City and County.

There is another point to be considered which is: that the provision of the Charter placing all parks and squares under the jurisdiction and control of the Park Commissioners, takes away from the Board of Supervisors, all power and authority in connection therewith, thus rendering abortive any action on the part of the Supervisors which would have the effect of eliminating one of the public parks.

You are therefore advised:

1st: That so much of Section 2 of Order No. 2521, which provides that both roadways and sidewalks surrounding Bernal Park be kept in order by the owners of property fronting thereon, is unconstitutional and invalid for the reasons above stated:

2nd: That, while your Honorable Board has the power to repeal order No. 2521, such action will not destroy the status of Bernal Park, and the same would still remain a public park in the event of such repeal.

3rd: That the City and County is, under the Charter, liable for its portion of the cost of all street work done in front of Bernal Park.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Playground Commission Not Having Adopted Rules, Cannot
Declare a Check Accompanying a Bid Forfeited if Suc-
cessful Bidder Declines to Sign Contract.**

October 8th, 1910.

Gentlemen: I am in receipt of your communication of the 21st ult., which reads as follows:

“On Thursday 25, 1910, the Playground Commission received and opened sealed bids at a regular meeting as advertised and recorded the following proposals:

J. P. Doherty	\$975.50
Ahlbach & Mayer	800.00
M. Levy	598.00

M. Levy being the lowest bidder was awarded the work but on the same afternoon and before the meeting had adjourned informed the Playground Commission that he had made a mistake and that he could not do the work for the figure included in his proposal. He stated that he only figured on the installation of the toilets and plumbing proper and that he did not estimate the cost of such carpenter work as is called for in the specifications. He has since refused to enter into a contract with the Playground Commission.

The Playground Commission holds Mr. Levy's check of Sixty Dollars (\$60.00) which accompanied his bid to do the work.

Will you kindly inform this Commission as soon as possible if Mr. Levy is to forfeit his check and the contract awarded to the next lowest bidder or is it necessary to advertise for new bids."

Opinion.

I have examined the proposal. It follows the form usually adopted by the Board of Public Works in the advertising for bids for similar articles. There is nothing in the proposal declaring that a contract for the articles in question will be let to the lowest bidder or that in case a bid for the articles is accepted by the Playground Commission and the successful bidder refuses or neglects to enter into the contract the certified check accompanying the bid will be forfeited to the City and County.

Article XIV-A of the Charter, relating to the powers and duties of the Board of Playground Commissioners, does not provide any method or procedure to be followed in the letting of contracts by the Playground Commissioners. In fact the Article does not directly confer upon the Playground Commissioners the power to let contracts.

Section 5 of the Article provides that:

The Commissioners shall have complete and exclusive control, management and direction of the aforesaid playground and recreation centers and the exclusive right to superintend the erection of buildings and structures thereon and they shall employ superintendents, surveyors, engineers, laborers and other employees and assistants and prescribe and fix their duties, authority and compensation; they shall have the exclusive management and disbursement of all funds legally appropriated or received from any source for the support and equipment of the aforesaid playground and recreation centers. * * *

The exclusive right to erect and superintend the erection of buildings and structures on playground and recreation centers takes from out of the control of the Board of Public Works and the Board of Supervisors those matters. The power to erect and superintend the erection of buildings would draw with it the implied power of adopting the means and methods for the erection of the buildings and would confer by implication, upon the Playground Commission, the right and power to let contracts for the erection of buildings and structures on playground and recreation centers.

As already pointed out, however, no method of procedure is laid down for the Commissioners to follow in letting of contracts. The Park Commissioners have been given, in Section 4 of Article XIV, the power to let contracts, but the section in addition has provided that "all the provisions of the Article in this Charter on the Department of Public Works relating to contracts, shall be applicable to all contract work ordered by the Commissioners." The provisions of the Charter relating to contracts let by the Board of Public Works are made by this section to apply to contracts let by the Park Commissioners the same as if they had been written in in full in the article relating to the Park Commissioners. But that is not true of the Playground Commissioners, and I know of no principle of law which will make the other provisions of the Charter relating to the letting of contracts applicable to the letting of contracts by the

Playground Commissioners. Such being the case the Playground Commissioners may adopt such rules and regulations for the letting of contracts as in their discretion they may deem advisable.

In Section 3 of Article XIV-A, it is provided that the Board "shall establish rules and regulations for its government and the performance of its duties." One of the duties of the Board being to erect buildings and structures on playground and recreation centers, and it being from that section necessarily implied that the Commissioners have the power to let contracts, it follows from the section just quoted that the Board should establish rules and regulations in the letting of contracts.

Under that section the Board could, if it saw fit, by resolution, adopt the provisions of the Charter relating to the letting of contracts by the Board of Public Works as the method or procedure to be followed by the Commissioners in the letting of contracts for the erection of buildings and structures on playground and recreation centers. In adopting such a rule it would only be necessary to provide generally that the provisions of the Article in the Charter on the Department of Public Works relating to contracts shall be applicable to all contracts let by the Playground Commissioners just as has been done by the Charter framers in Section 4 of Article XIV relating to the letting of contracts by the Park Commissioners.

I am advised that the Commissioners have not adopted rules and regulations to be followed in the letting of contracts. It follows that unless it was necessary for the Board to adopt rules and regulations before a contract could be legally let that in the present case there is nothing to prevent the Board from accepting the next lowest bid, provided that the contractor is willing to enter into the contract. I am, however, of the opinion that before a contract should be let by the Playground Commissioners that rules and regulations should be adopted by the Playground Commissioners governing the method of procedure to be followed in the letting of such contracts.

While under the provisions of the Charter it would seem that a wide discretion has been given the Playground Commissioners, whether intentionally or not, in the letting of contracts, yet general principles of law covering the discretion of public officers would require that the Board must secure for the City and County the best possible contract that it is able to secure. An individual in letting a contract can let it to whomsoever he pleases, but no official of a municipality has that power for the reason that the funds with which he is dealing belong to the municipality and he is in duty bound to protect those funds to the utmost of his ability.

Of course, as already pointed out, there is nothing in the Charter requiring that bids should be called for, the Playground Commissioners apparently having the power to make contracts without first calling for bids, but no rules or regulations have been adopted by the Playground Commissioners governing the method or scheme for the letting of contracts, and it, therefore, would appear that the Playground Commissioners have not proceeded in any particular manner to enter into a contract for the supplies in question. They have merely acted upon the assumption that the provisions of the Charter relating to the letting of contracts by the Board of Public Works apply when those provisions in fact do not apply.

As stated above, the proposal in question calling for contracts does not declare that in case the successful bidder does not enter into the contract that his certified check will be forfeited to the City and County, and the position of Levy, irrespective of whether or not the failure to adopt rules and regulations has rendered the Playground Commissioners without jurisdiction to let contracts, is the position of a bidder in an ordinary contract; and the common rules or laws relating to contracts only apply. When Levy made his proposal and it was accepted, he was then under a legal duty to enter into a contract, but if he refused all that the Playground Commissioners could recover from Levy for his

breach of contract would be damages that the Playground Commissioners have actually suffered.

The forfeiture of a certified check accompanying bids, however, rests upon a different principle. That is a pure forfeiture, or at least an agreement between the bidder and the City and County that in case the bidder shall refuse to enter into the contract that the amount of his check shall be taken as liquidated damages, and unless some statute declares a forfeiture in case of the refusal or neglect of the bidder to enter into a contract or there is an agreement between the parties that a forfeiture shall take place, the party injured by the breach of contract has not the right to declare a forfeiture. It follows that the Playground Commissioners have not the power to order the Levy check forfeited.

I would advise that under all the circumstances your Board first adopt rules laying down the procedure in the letting of contracts, and that in the present case new proposals be made for the articles in question.

Respectfully,

PERCY V. LONG,
City Attorney.

Playground Commission.

School Funds Cannot Be Diverted from School Purposes.

October 10th, 1910.

Gentlemen: I am in receipt of your request for an opinion of the 7th inst., as follows:

“I am directed by the Board of Education to respectfully request from your office an opinion as to whether or not the Board would be justified in ordering paid out of school funds a bill of some one thousand dollars for postage on post-cards to be furnished by the Panama-Pacific International

Exposition Committee and addressed by the school children of San Francisco.”

I cannot find in the Charter of the City and County any warrant for your expending any sum of money for postage on post-cards for the purposes indicated in your request for an opinion. That is, it is apparent that the purposes served by the expenditure of money for sending out these post-cards would be the general interests of the City and County of San Francisco, rather than any particular interests of the School Department of our city.

I would therefore suggest to your honorable Board that you refer this matter to the Board of Supervisors for them, as the legislative representatives of the City, to take action upon.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

City Ordinances Relate to the Construction and Maintenance of Stables—Not to the Person Who Conducts Them.

October 13th, 1910.

Gentlemen: I am in receipt of your communication under date of September 22nd, as follows:

“I am instructed by the Committee on Hospital and Health of the Board of Supervisors to request your opinion as to whether or not permits granted to conduct and maintain stables are transferable.”

Opinion.

The ordinances regulating the construction and maintenance of stables in the City and County of San Francisco particularly refer to the maintaining of stables and do not use the word “conduct”.

I am of the opinion that no permit is required to conduct a livery or other stable, but the property owner desiring to construct a building, or use a building already constructed for purposes of a stable must secure the permit provided for in the ordinances. Such permit is granted to the property owner at a specific location and is not transferable to any other person or to any other location.

If the property owner complies with the various ordinances touching upon the matter of stable construction and stable maintenance he is entitled to a permit and it is no concern of the city officials who shall conduct the business.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Form of Ordinance Submitted Prohibiting the Maintenance of Livery Stables Within 50 feet of any Dwelling, etc.

October 19th, 1910.

Gentlemen: I am in receipt of your communication of August 5th, 1910, as follows:

"I am directed by the Committee on Hospital and Health of the Board of Supervisors, to refer to you a proposed amendment to Section 1 of Ordinance No. 334 (New Series) regulating stables, with regard to stabling horses within fifty feet of any church, residence or school, and request your advice as to construction of same. The proposed amendment is as follows:

SECTION 1. It shall be unlawful for any person, firm or corporation to hereafter construct and maintain, within the City and County of San Francisco, within fifty feet of any residence, dwelling place, schoolhouse or church, any stable for more than four (4) horses, or to maintain as a stable for

more than four (4) horses within fifty (50) feet of any residence, dwelling place, school house or church any structure not used (on the 9th day of January, 1909) for the purpose of stabling more than four horses.”

Opinion.

The proposed amendment to Ordinance No. 334 (New Series) is subject to the objection that it discriminates between those using or maintaining, as a stable for more than four horses, any structure within fifty feet of any residence, etc., on or before the 9th day January, 1909, and those constructing and maintaining such a stable after that date.

The Supreme Court of this State had occasion to pass on a very similar ordinance in *Ex Parte Bohen*, 115 Cal., page 372. In that case the City and County of San Francisco had passed an Ordinance, Order No. 2950, “prohibiting the further purchase of lots for burial purposes within the City and County of San Francisco, also providing for further burials being made only in lots heretofore acquired by persons or associations for burial purposes.” The Court in holding that the Ordinance was unreasonable and invalid for the reason that it discriminated between those who had purchased lots in the cemetery before the passage of the Ordinance and those who were not similarly situated, cited with approval the case of *Tugman vs. Chicago*, 78 Ill., 405. In that case—

“The City of Chicago had passed an ordinance prohibiting the erection or operation after January 1, 1872, of slaughter-houses within a designated portion of the city, ‘in any building not now used for such purpose’. It was held by the Court that the ordinance was invalid by reason of its discrimination between those owning and operating slaughter-houses prior to 1872, and those erecting and operating them after that date, upon the ground that an ordinance which would make an act done by one penal and impose no penalty for the same act done under like circumstances by another could not be sanctioned or sustained, because it would be unjust and unreasonable, saying:

'If the health or comfort of the city require the prohibition of new slaughterhouses within a designated part of the city, the same reason would surely demand that old ones should be discontinued. If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business would not only be unreasonable, and for that reason void, but its direct tendency would be to create a monopoly, which the law will not tolerate. The fact that certain persons were engaged in the business within the district designated in the ordinance, at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege, who should engage in the business at a later period. If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced. A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation.' "

You are therefore advised that the proposed amendment would be invalid if adopted by your Honorable Board and that the same reasoning and holding applies to the present Ordinance No. 334 (New Series).

Assuming that your Board has been importuned by those who suffer from nuisances caused by stables in their immediate vicinity to pass an ordinance regulating stables, and also assuming that you are desirous of affording those persons substantial relief by the passage of an ordinance that will reach the root of the evil complained of, I take the liberty of presenting to you an amendment to the present Ordinance No. 334 (New Series), which will have the effect of abolishing all stables for more than four horses within fifty feet of

any residence, etc. In my opinion such an ordinance would be free from all objectionable features as to its validity and could be sustained in the Courts.

The following is the amendment:

“Section 1. No person, firm or corporation shall hereafter occupy, use or maintain, within the City and County of San Francisco, any building or place, for a stable for more than four horses or mules, within fifty feet of any residence, dwelling place, schoolhouse or church.”

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Tenement Houses—Height of—Governed by Sections 15 and 35 of State Tenement House Act.

October 20th, 1910.

Gentlemen: I am in receipt of your communication of September 14th, 1910, reading as follows:

“This Board desires to be advised as to whether the decision of the Superior Court, in the matter of Linforth vs. The Board of Public Works, shall be regarded as a definite determination of the points raised in that matter; and, if it be conclusive in respect thereto, shall the ruling of the Court made therein be applicable to and govern in cases of proposed building construction, involving points substantially similar to those presented for adjudication and passed upon by the court in the said matter.”

Opinion.

The decision referred to was a case involving the question whether or not the municipal ordinance in force at that time limiting the height of all wooden structures in the City to

forty-five feet, governed the height of tenement houses constructed under the State Tenement House Act and the decision of our Superior Court was that it did not.

At the time the Linforth case was decided there was pending before the Board of Supervisors a new ordinance regulating the construction of buildings in the municipality which was subsequently passed by the Board and is still in force. That ordinance still further limits the height of wooden buildings in San Francisco. The limit now is forty feet and within that forty feet there cannot be more than three stories and a basement. (Sec. 78, Ordinance 1008, New Series.)

The section in its terms applies to **all** wooden structures. Section 190 of the same Ordinance, however, reads as follows:

“Tenement houses and apartment houses shall be constructed in accordance with the provisions of that certain Act of the Legislature of the State of California entitled ‘An Act to regulate the building and occupancy of tenement houses in incorporated towns, incorporated cities and cities and counties, and to provide penalties for the violation thereof,’ approved April 16, 1909, and with the provisions of any and all amendments thereto.”

The effect of Section 190 is to adopt as a municipal law each and every provision of the State Tenement House Act and the result is the same as if the entire law had been repeated in full in the ordinance.

The regulations in the State law affecting the height of frame tenement houses are found in Sections 15 and 33 of the Act, which read as follows:

“Sec. 15. Within the fire limits of any incorporated town, incorporated city or city and county, no wooden building not now used as a tenement house shall be hereafter erected for, altered or converted to such use. But outside of the fire limits tenement houses not exceeding four stories in height, exclusive of the cellar, may be erected of wood.”

“Sec. 33. The height of no tenement house hereafter erected shall by no more than one-half exceed the width of the widest street upon which it stands.”

It is seen from these sections that the Legislature has covered fully the height of tenement houses. Sections 78 and 190 having been passed at the same time, Section 78 of the Ordinance and Sections 15 and 33 of the State Law must be read and construed together. The effect of reading these sections together is to exempt tenement houses from the height restrictions of Section 78 and substitute therefor the height regulation of the State Act as found in Sections 15 and 33 of the Act.

It possibly did not occur to the Supervisors in passing Section 190 of the Ordinance that the Ordinance would permit the erection of a four story frame tenement house. That is nevertheless the effect of the section. The Board of Supervisors have therefore declared that so far as the construction of tenement houses is concerned the State Law alone is to be looked to. That being the case it is unnecessary to discuss the ruling of the case of *Linforth vs. The Board of Public Works* and you are advised that as long as the law remains in its present condition Sections 15 and 33 of the State Tenement House Act alone govern the height of Tenement Houses.

I may add, however, that I am ahead of the opinion that it is competent for the Board of Supervisors to enact requirements additional to those of the State Act, though a municipal ordinance may not undertake to make lawful that which by the State Law is declared unlawful. That was the rule laid down in the case of *In re Hoffman*, 155 Cal., at page 114. *In re Hoffman* is cited in the case of *May vs. Craig, et al.*, decided by the Court of Appeal, Second District, California, on May 7th, 1910, (109 Pac. 842.) That case came before the Court on a writ of mandate to compel the Board of Public Works of the City of Long Beach to issue a permit for the erection of a tenement house in conformity with a City ordinance, but which would not meet the requirements of the State Tenement House Act. The Court refused to issue a writ

of mandate upon the ground that the State Law was supreme, but said, however, that the City could enact requirements additional to those of the State Law upon the authority in re Hoffman.

Upon the principle announced by those two cases the Board of Supervisors may, if they deem it expedient, make the height of tenement houses in San Francisco subject to the provisions of Section 78 of the Building Ordinance.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Insurance Brokers License—Payment of License Voluntary
—No Refund Permissible.**

October 22nd, 1910.

Gentlemen: I am in receipt of your communication of the 11th inst., in which you state that a petition has been filed with the Board of Supervisors for the refund of \$55.00 paid by an insurance broker for a license under the provisions of Ordinance No. 760, said Ordinance being declared in the petition to be invalid and void. You request an opinion as to whether the contention made in said communication has any foundation in law.

Opinion.

You are advised that inasmuch as under the laws of this State the payment of such a license fee constitutes a voluntary payment, that there is no legal liability on the part of the Board of Supervisors to refund any such payment so made. It is unnecessary to consider the question of the validity of the aforesaid Ordinance.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Laying of Steam Pipes in Public Streets for Heating Purposes Not a Right Conferred under Section 19 of Article XI of State Constitution. Franchise Necessary.

October 28th, 1910.

Gentlemen: I am in receipt of your communication of October 14th, which reads as follows:

“Referring to your opinion given to the Board of Public Works, dated August 25th, relating to the rights of a corporation to lay pipes in the streets for the purpose of supplying steam, hot water and heat, without any franchise from the City; do we understand therefrom that the opinion will apply to the following facts?

A pipe laid in the street, conveying steam, which steam is not consumed by consumers but is retained in the pipe, the heat generated from the steam being the only element actually used and consumed. Does the right to lay such pipe require a franchise from the City; if so, under what law can such franchise be granted?”

Reference to my opinion of August 25th shows that the state of facts as set forth in your communication, upon which my opinion is based, is different from the state of facts given in your communication of October 14th. The point involved in my former opinion was passed upon by the Supreme Court of this State in at least four cases, i. e. *Perrari vs. Wallace*, 129 Cal. 397, *In re Johnson*, 137 Cal. 114, *Denninger vs. Recorder's Court*, 145 Cal., 630 to 639, and *People v. Los Angeles Ind. Case*, 150 Cal. 559.

The principle is probably best stated in *In re Johnson*, at page 122 of the opinion, which reads as follows:

“The suggestion on the part of the respondent that it is the purpose of the corporation herein to supply gas through its pipes for other purposes than light, even if founded upon fact, does not deprive it from exercising the right conferred upon it by the constitution, or authorize the municipality to

prevent it from enjoying that right. Even though the pipes when laid may be available for other purposes than supplying gas light, the corporation is not thereby deprived of the right which the constitution has given it to lay its pipes in the streets, nor can it be required as a condition of exercising that right to declare that the gas to be supplied by it shall be used exclusively for illumination, or is it to be supplied solely for such use. It may be added that it is not made to appear that the streets will be subject to any other or greater obstruction than is requisite for the supplying of gas for illuminating purposes. One of the purposes for which the corporation, Valley Gas and Fuel Company is organized is to supply municipalities and their inhabitants with gas for artificial light, and it has given to the City of Pasadena a bond executed in accordance with the ordinance of that City, to indemnify it for damages, and, by its notice to the Superintendent of Streets of the time and place at which it would commence to lay its pipes, has given to that officer an opportunity of having the work done under his direction. The corporation has thus complied with all the conditions named in the constitution as requisite to confer upon it the right to lay its pipes in the streets of that city, and while so engaged its servants and employees are in the exercise of a lawful occupation, for which they cannot be subjected to criminal prosecution or arrest."

It is seen that the principle of these cases is that any individual or any company duly incorporated for such purpose shall have the privilege of using the public streets and thoroughfares thereof so far as may be necessary for introducing into and supplying such city with gas light or other illuminating lights and may, under the constitutional privilege of Section 19, Article XI, as an incident of that business, also supply through the same pipe, gas for purposes other than illumination.

When, however, a company desires to give a service other than the service of introducing into and supplying a city and its inhabitants with gas for other than illuminating pur-

poses, or a service made possible by the use of water, they cannot avail themselves of Section 19 of Article XI and avoid the necessity of first obtaining a permit or franchise to do the same.

From your communication it appears that steam is not furnished to the consumers, but only heat is furnished and the fact that water is used in the generation of the heat can have no more influence upon their right to avail themselves of Section 19 of Article XI than if heated air is used instead of steam in furnishing the heat. In giving this service the company is not supplying the inhabitants of the municipality with water and the constitutional privilege does not extend beyond that right.

I advise you therefore that my opinion of August 25th, 1910, does not apply to the facts stated in your communication of October 14th. The company, not having the right to lay its pipes in the street by virtue of Section 19 of Article XI of the Constitution, a franchise to do the same must be obtained from the City. The Charter does not provide for the granting of a franchise of this character. It must be granted under the general law.

The Act of the Legislature entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchise by legislative or other governing bodies and repealing conflicting acts", approved March 23rd, 1905, (Statutes 1905, page 777) and amended in 1909, (Statutes 1909, page 125), fully covers the granting of a franchise of this character.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Board of Education is Without Power to Grant Permanently
to the Play Ground Commission any Unused Lots.**

October 29th, 1910.

Gentlemen: I am in receipt of your communication of the 26th inst., as follows:

“The Playground Commission in an effort to secure additional locations for the recreation centers has of recent date obtained the use of the former California Women’s Hospital site from the Board of Education. The Playground Commission requested the opportunity of using this ground for playground purposes when informed that the Board of Education anticipated no development on this lot.

At the time of the removal of the hospital building, both the Playground Commission and the Board of Education applied to the buildings committee of the the Board of Supervisors for this site and the same was awarded to the Board of Education. It now comes back to the Playground Commission in the following resolution:

‘Resolved: That tender is hereby made to the Playground Commission, of the following property belonging to the School Department; California Women’s Hospital Site: Sacramento Street between Baker and Lyon streets.

The site formerly procured as an annex, at the west side of the Mission High School Building is also included in the above resolution for the same purpose.’

This Commission would like to know if such tender as made by the Board of Education is sufficient guarantee that the properties in question will remain in the department of the Playground Commission, some assurance being necessary in order to warrant the improvements contemplated. A consideration of this matter by your office will be greatly appreciated by the Playground Commission.”

Opinion.

The Charter of the City and County of San Francisco does not give the Board of Education of this City the power or authority to transfer from the School Department any unused lots or lands of said Department to any other Department of the City and County. That power is expressly given and reserved to the Board of Supervisors by Sub. 31, Sec. 1, Chap. II, Art. II of the Charter, which reads as follows:

Sec. 1. Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power:

Sub. 31. To transfer from one department of the City Government vacant and unused lots of land to another department.

Consequently, any transfer of property from the School Department to the Playground Commission must, of necessity, be of a temporary character, subject to the exercise of the power of the Board of Supervisors at any time to transfer said property from the School Department to any other Department of the City and County.

You are advised that the transfer made by the Board of Education to the Playground Commission, as noted in your communication, carries with it no guaranty that the properties in question will remain permanently in the Department of the Playground Commission for the reasons stated above.

Respectfully,

PERCY V. LONG,
City Attorney.

Playground Commission.

**Doubtful Whether Saloons can be Closed at Special Elections
for Charter Amendments.**

November 9th, 1910.

Dear Sir: I am in receipt of your request of November 2, 1910, for an opinion as to whether the Police Department would be warranted in insisting upon the closing of saloons in San Francisco, on November 15, 1910, when a special election is to be held for the purpose of voting on proposed Charter Amendments.

Opinion.

On December 29, 1909, I rendered an opinion to the Mayor of this City to the effect that there was very grave doubt as to whether Section 63b of the Penal Code of this State which prohibits the selling of liquors on election days, applied to a special election then about to be held in this City for the purpose of creating a bonded indebtedness.

As I suggested in that opinion, the undoubted purpose of the law forbidding the sale of liquors on election days is to prevent candidates for office from improperly influencing voters by giving or encouraging the giving of liquor in sufficient quantities to deprive the voter of his judgment and reason. I did not, at that time, believe that this general purpose required the application of the Penal Code Section to the bond election, and I am now of the opinion that there is just as grave doubt of the application of this law to an election such as is about to be held for the adoption of amendments to the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Chief of Police.

Inheritance Tax Collections—Time of Settlement With the State.

November 10th, 1910.

Dear Sir: I am in receipt of your request for an opinion as follows:

“Will you kindly advise this office at what dates it is incumbent for me, under the law, to settle with the State for Inheritance Tax Collections.”

Opinion.

Section 21 of the Act approved March 20th, 1905, relating to a tax on gifts, legacies, inheritances, bequests, successions and transfers, provides as follows:

“The Treasurer of each county shall collect and pay the State Treasurer all taxes that may be due and payable under this Act, who shall give him a receipt therefor; of which collection and payment he shall make a report, under oath, to the controller, between the first and fifteenth days of May and December of each year, stating for what estate paid, and in such form and containing such particulars as the controller may prescribe; and for all such taxes collected by him and not paid to the State Treasurer by the first day of June and January of each year he shall pay interest at the rate of ten per centum per annum.”

Only one construction, compatible with the general tenor of the language used above, can be placed upon Section 21, and that is, that all taxes collected by County Treasurers under said Act, shall be immediately on the collection thereof, paid to the State Treasurer, who shall give his receipt for the same. The Section provides for the rendition of reports, under oath, by the County Treasurers to the State Controller of such collections and payments between the dates therein specified, and further provides that semi-annual settlements be made by said County Treasurers on or before the first

day of June and January of each year; in other words, taxes collected by the County Treasurers, after the rendition of the semi-annual reports to the controller, must be paid on or before the dates mentioned above, so that there will be nothing due to the State after said dates on account of any taxes collected prior thereto.

You are therefore advised that it is your duty, under the statute, to make the payment of taxes collected thereunder, in the manner and at the times specified above.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Claim of Louis Ferrari for \$300 for Legal Services not a Valid Claim Against City.

November 11th, 1910.

Gentlemen: I am in receipt of your communication of October 18, 1910, which reads as follows:

"I am enclosing herewith communication from Mr. C. M. Fickert, District Attorney, addressed to the Finance Committee, with other papers, relative to the claim of Louis Ferrari in the sum of \$300.00 for legal services rendered in the perfection of an appeal on behalf of the District Attorney from an Order of the Superior Court, sustaining a demurrer to the information in the case of "People vs. W. B. Nash", and for legal services in presenting and arguing said Appeal before the District Court of Appeals.

In his communication Mr. Fickert states that Mr. Ferrari was not retained in the matter at his instance, but conducted the case in conjunction with the Attorney General. In this connection you will note that while the Transcript on Appeal bears the name of the District Attorney, Appellant's Brief and Appellant's Reply Brief are signed by the Attorney General and Mr. Ferrari.

Mr. Ferrari stated to the Finance Committee that he prepared the Appeal while in office under Mr. Langdon, and that later, on the Attorney General communicating with him, he saw Mr. Fickert, who referred him to Mr. Cotton. The latter gentleman told him to go ahead and they would see that he was compensated.

The Finance Committee wishes to be advised whether Mr. Ferrari's claim is a just one against the City and County, having regard to the fact that he was retained at the instance of the Attorney General."

Opinion.

The claim presented by Mr. Ferrari states that the services performed by him were rendered on behalf of the District Attorney of this City and County, but the letter from Mr. Fickert, District Attorney, states that "Mr. Ferrari was not retained in the matter at my instance, but conducted the case in conjunction with the Attorney General." It is apparent that there was a misunderstanding between Mr. Fickert and Mr. Ferrari on the matter of the employment of the latter to conduct the proceedings on the appeal of the case mentioned.

Disregarding that point, however, I will proceed to define the rights and liabilities of this City and County in the matter presented for my opinion, so that the same may be a guide for your Honorable Board in similar cases.

There is no suggestion that Mr. Ferrari was appointed by the District Attorney in conformity with the provisions of Section 35, Article XVI, Miscellaneous, of the Charter of this City and County, which provides for the appointment of additional deputies, clerks or employees required by an officer, board or department. I will assume that there is no discrepancy between the statements of the District Attorney and Mr. Ferrari as to the nature of the employment, and further, that Mr. Ferrari was, in fact, retained by the District Attorney to perform the alleged services.

The Charter provides, Section 2, Chapter III, Article V, that the District Attorney shall have all the powers con-

ferred and shall discharge all the duties imposed upon the District Attorneys of counties by the general laws of this State, and, in Section 3, same Chapter and Article, it provides for the appointment of assistants and clerks and limits the number of said appointments and provides for the compensation of the same. Section 34, Article XVI, Miscellaneous, of the Charter, provides that "the salaries provided in this Charter shall be in full compensation for all services rendered * * *."

Therefore, neither the District Attorney, nor his assistants can claim any extra compensation for their services. If the Charter allows an assistant and fixes the salary, then, and not otherwise, is the City and County liable.

The only other provision of law under which the City and County might be liable, in a proper case, for expenses incurred by the District Attorney, is Section 4307 of the Political Code of this State, which makes "the traveling and other personal expenses of the District Attorney, incurred in criminal cases arising in the county and civil actions and other proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases and in civil actions and proceedings and all other matters in which the county is interested" a county charge.

The Supreme Court of this State, in the case of *Hummiston vs. Shaffer*, 145 Cal., at page 197, uses the following language in reference to the extract from Section 4307, in passing on a very similar claim presented by the District Attorney of San Diego County.

"The above quoted language does not include charges of the kind claimed by plaintiff in this case. The District Attorney must write his own letters or pay some one to write them for him, in the absence of any law authorizing the paying of a deputy or assistant. If he could make the cost of copying or writing letters and opinions a personal expense within the meaning of the section, he could on the same prin-

ciple make the cost of employing an attorney to look up authorities and write briefs a personal expense. He could on the same principle incur personal expense by hiring everything done in connection with his office. His food, clothing, cigars, and amusements are personal expenses, but not such as contemplated by the statute."

Again on page 198 the following language is used:

"If such allowance could be made to a typewriter, it could on the same principle, be allowed to a clerk or attorney employed by the District Attorney."

The principle laid down in the Hummiston vs. Shaffer case has been universally upheld by the Supreme Court of this State and disposes of the claim presented here.

The Attorney General of the State of California, and not the District Attorney of this City and County, is charged with the duty of appearing on behalf of the people in criminal cases on appeal. Subdivision 1 of Section 470 of the Political Code, provides:

"It is the duty of the Attorney-general to attend the Supreme Court and prosecute or defend all causes to which the State or any officer thereof, in his official capacity, is a party."

Therefore, any services rendered by Mr. Ferrari in the case on appeal, were rendered, not for the City and County of San Francisco, but for the State of California.

You are therefore advised that there is no obligation resting upon the City and County to pay the claim referred to in your communication and that said claim is not a valid one against the City and County of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Additional Captains in the Police Department Are Created
by Ordinance of Board of Supervisors Upon Recommendation of Mayor. The Board of Police Commissioners May Then Appoint the Highest Eligible Lieutenant.**

November 14th, 1910.

Gentlemen: I am in receipt of your request under date of November 11th asking for an opinion as to the legality of the appointment of Lieutenant Patrick Shea to the position of Captain of Police. You state in your request that Lieutenant Shea stands highest on the eligible list of the Civil Service for appointment as Captain and that the judgment of the Police Commission is that, inasmuch as the Department is deprived of the services of one of its captains by reason of the assignment to the Captaincy of Detectives, that the appointment from the eligible list of the Civil Service could be legally made.

In my opinion the only way that an additional Captain can be created in the Police Department is by ordinance of the Board of Supervisors.

I therefore advise you that the Mayor must recommend to the Board of Supervisors the creation of an additional Captaincy in the Police Department, and after the passage of such ordinance your Board will have the power to appoint Lieutenant Shea. The procedure is laid down in Section 35 of Article XVI of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

**Auditor's Office—Additional Employees May Be Appointed
Without a Charter Amendment—New Appointees Sub-
ject to Civil Service.**

November 14th, 1910.

Gentlemen: I am in receipt of your request for an opinion dated November 9, 1910, as follows:

“At the meeting of the Board of Supervisors held on Monday, November 7, 1910, I was directed to transmit to you the enclosed copy of an ordinance entitled, ‘Authorizing the Appointment by the Auditor of Certain Additional Employees and Fixing their Compensation,’ the purpose of which is to increase the salaries of certain employees of the Auditor’s office, and to request your opinion as to its legality.

The question has been raised as to whether or not it will require a Charter Amendment to accomplish this object, and for that reason the Board desires your advice as to the sufficiency of the proposed ordinance.”

Copy of Proposed Ordinance.

Authorizing the Auditor to appoint certain additional employees in his office, and fixing their compensation.

Be it ordained by the People of the City and County of San Francisco, as follows:

Section 1. Upon the recommendation of his Honor, the Mayor, and in accordance with the provisions of Section 35, Article XVI, of the Charter, the Auditor is hereby authorized and empowered to appoint, subject to the provisions of Article XIII of the Charter, one assistant deputy at an annual salary of twenty-four hundred (2400) dollars, five assistant deputies at an annual salary of eighteen hundred (1800) dollars each, and one telephone operator at an annual salary of nine hundred (900) dollars.

Section II. This ordinance shall take effect immediately.

Opinion.

I understand that the places whose salaries it is desired to raise are not Charter positions, but positions which have already been created by Ordinance of the Board of Supervisors under the terms of Section 35, Article XVI, of the Charter, which provides that

“When any officer, board or department shall require additional deputies, clerks or employees, application shall be made to the Mayor therefor, and upon such application the Mayor shall make investigation as to the necessity for such additional assistance; and if he find the same necessary he may recommend to the Supervisors to authorize the appointment of such additional deputies, clerks or employees; and thereupon the Supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointments and provide for the compensation of such appointees, subject to the limitations contained in this Charter, and subject to the provisions of Article XIII thereof.”

The salaries attached thereto are therefore not fixed by the Charter, but by the Ordinance creating them. Two questions arise: first, whether the original Ordinance authorizing the appointments may be amended; and second, whether the term “extra clerks”, as used in Section 2, Chapter II, Article IV, of the Charter, includes such employees as are named in this Ordinance. That section authorizes the Auditor to employ “such number of extra clerks during the time their services may be necessary for the lawful discharge of his official duties, as the Board of Supervisors may designate. Such extra clerks shall each receive a salary not to exceed one hundred dollars a month for the time they shall be actually employed.”

As to the first question, I am of the opinion that an ordinance authorizing the appointment of additional deputies or clerks under Section 35 of Article XVI of the Charter may be amended in the same manner as is prescribed by the section for the adoption of the original ordinance.

As to the second question, I am of the opinion that Section 2 of Chapter II of Article IV of the Charter, which authorizes the Auditor to "employ such number of extra clerks during the time their services may be necessary for the lawful discharge of his official duties as the Board of Supervisors may designate," applies only to temporary clerks required for emergency purposes, such as work upon the budget, and assessment work. Practically the same language is used in the chapters referring to the Assessor and the Tax Collector.

Section 1 of Chapter IV of Article IV authorizes the Assessor to employ "during four months of the year not more than one hundred clerks, who shall each be paid at the rate of not more than one hundred dollars a month during the time of their employment."

Section 1 of Chapter V of Article IV of the Charter authorizes the Tax Collector to employ "extra clerks, who shall each be paid at the rate of not more than one hundred dollars a month during the time of their employment." The term "extra clerk" as used in these sections of the Charter undoubtedly refers to temporary clerks employed for emergency purposes, and not to the permanent employees authorized by Section 35 of Article XVI of the Charter.

You are therefore advised that it will not require a Charter amendment to accomplish the object sought, and that the proposed Ordinance is sufficient. These positions being thus created as new positions, would thereupon be subject, of course, to the Civil Service provisions of the Charter, and those appointed to fill them would be governed as to their qualifications by those provisions.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Public Funds in Consolidated Banks—Such Bank May
Retain the Funds Deposited Before Consolidation Upon
the Usual Conditions.**

November 22nd, 1910.

Dear Sir: In reply to your letter of recent date inquiring whether, in the case of the consolidation of two or more banks holding deposits of public funds, the consolidated bank can retain the deposits of the banks absorbed by it, I desire to say that there is nothing in the law or Charter prohibiting you from granting the request of the consolidated bank, provided (1) that the total amount of deposits given to the consolidated bank does not exceed fifty per cent of the paid-up capital of such consolidated bank, and (2) that the total amount deposited with such consolidated bank is not in excess of ten per cent of the public moneys under your control and available for deposit while there are other qualified banks requesting such deposits.

Care should be taken to the end that the consolidated bank properly assumes the obligation of the banks absorbed by it.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

**Section 21 of the Act of 1907 Relating to Pure Food Has
Not Been Amended.**

November 29, 1910.

Gentlemen: I am in receipt of your request of November 23, 1910, in which you ask for an opinion as to whether Section 21 of the Act of the Legislature of the State of California of 1907, Chapter 181, which requires that one-half of the fines collected under the Pure Food Law shall be paid to the State Treasurer, has been amended.

In reply I advise you that I find no amendment to this Section of the said Act of the Legislature.

Respectfully,

PERCY V. LONG,
City Attorney

Finance Committee,
Board of Supervisors.

**Purchaser at a Tax Sale—Issuance of Deed Restrained by
Court Order—Money Should Be Returned.**

November 30th, 1910.

Gentlemen: I am in receipt of your communication with reference to the petition of Frank W. Aitken for the return of \$1275 taxes paid by Mr. Aitken as a purchaser at a tax sale held on August 20th, 1909, by the Tax Collector of the City and County of San Francisco, which tax sale followed from the delinquency of taxes for the year 1902-03 upon, and the sale to the State of, the following described property:

“Commencing at a point on the westerly line of Twenty-fifth Avenue distant three hundred feet southerly from the southerly line of ‘R’ Street, and running thence southerly along said westerly line of Twenty-fifth Avenue one hundred and twenty-five (125) feet; thence at right angles westerly two hundred and forty (240) feet to the easterly line of Twenty-sixth Avenue; thence at right angles Northerly along said Easterly line of Twenty-sixth Avenue one hundred and twenty-five (125) feet, and thence at right angles Easterly two hundred and forty (240) feet to said Westerly line of Twenty-fifth Avenue and point of commencement; being a portion of Outside Land Block No. 1097.”

The total delinquent taxes, penalties, costs, interests and advertising amounted to \$13.37 and the property was sold

to Aitken for \$1275. I understand that this sum of \$13.37 has been deposited by the California Investment and Financial Company with the County Treasurer and that Company is agreeable to the said amount going to pay the above penalties, costs, etc.

This property is assessed to the California Investment and Financial Company, a corporation, which company, subsequent to the aforesaid tax sale and purchase by Aitken, brought an action in the Superior Court of this City and County, numbered 24896, entitled California Investment and Financial Company, etc., vs. David Bush, Tax Collector of the City and County of San Francisco, State of California, and Frank W. Aitken, in which action final judgment was rendered by Judge Seawell of our Superior Court in September, 1910, restraining the issuing of a tax deed in the matter of the above sale, upon the ground that the tax of 1902-03, which was the basis of the tax sale, was an illegal and void tax, inasmuch as it was a tax levied for school and hospital buildings, items for which were not included in the budget for the year 1902-03. This was the sole ground for Judge Seawell's judgment.

Aitken, being unable to get a deed from the Tax Collector, because of this judgment, has petitioned your Board for a return of the money which he paid at the tax sale in the purchase of the property.

Opinion.

This petition is filed under Section 3804 of the Political Code, which provides that:

“Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, * * * may, by order of the Board of Supervisors, be refunded by the County Treasurer. * * * ”

In the case of *Hayes vs. The County of Los Angeles*, 99 Cal., 74, the Supreme Court of this State held that the word “may” in this section was to be construed as “shall” and that

the Supervisors shall have no option to refuse to provide for refunding the money so paid. In that case the plaintiff was a purchaser at a tax sale who had paid the taxes after the owner had previously paid them, and his payment, therefore, was a payment made "more than once," as above provided for in Section 3804, and it was held by the Supreme Court that this section of the Political Code is not limited in its application to taxpayers alone, but includes and protects the purchaser at a tax sale who pays the taxes.

The language of the Court, at page 81, is as follows:

"The purchaser at a tax sale pays the taxes as effectually as could have been done by the owner without a sale, and if they have been previously paid by the owner of the property, and it was therefore sold for the same tax, and the taxes again paid by the purchaser, it is a payment **more than once** within the purview of the statute, for which the purchaser or his assignee may recover from the county, as provided in Section 3804."

And so, too, of course, the payment made by Mr. Aitken in this case was, under the ruling of Judge Seawell, the payment of a tax "erroneously or illegal collected" under Section 3804. Therefore, under that section, your honorable Board is bound to return such money.

With reference to the portion of this amount which has been paid by the City and County to the State, as the State's pro rata of same, Section 3804 goes on to say:

"Whenever any payment shall have been made to the State Treasurer by the County Treasurer, as provided by Section 3865 and Section 3866 of this Code, and it shall hereafter appear to the satisfaction of the Board of Supervisors that a portion of the money so paid should be refunded as herein provided, said Board of Supervisors may refund such portion of the said taxes, penalties and costs so paid to the State Treasurer, to the person entitled to the same, out of the general fund, and upon the rendering of a report required by Section 3868 of this Code, the Auditor shall certify to the Con-

troller, in such form as the Controller may prescribe, all amounts so refunded, and in the next settlement of the County Treasurer with the State, the Controller, if satisfied of the legality of such refunding by the said Board, shall give such Treasurer credit for the State's portion of the amount so refunded, as prescribed in Section 3871 of this Code."

You will therefore see that the procedure is in this section outlined for the City's adjustment of this matter with the State Controller, and you are advised that the petition of Mr. Aitken should be allowed.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Building Law—Installation of Electric Fixtures—Installation of Original Wiring.

December 1st, 1910.

Sir: I am in receipt of your request for an opinion as to whether Sections 271, 272, 274, 275 and 278 of Ordinance 1008 (New Series), known as "The Building Law", apply to the installation of electric lighting fixtures and devices of various kinds in the same way as they apply to the installation of original wiring in a building.

Opinion.

Section 270 of the Building Law requires that "all electrical **construction**, all **material** and all **appliances**" (in the City of San Francisco) * * * "shall be in conformity with the rules and regulations set forth in what is known as the 'National Electrical Code.' * * *"

Section 271 requires "every corporation" * * * "engaged in conducting the business of placing, installing or operating electrical **wires**, **appliances** and **apparatus** or **con-**

struction in or on buildings" to register their names and places of business, etc., with the Department of Electricity, and thereupon obtain a "Certificate of Registration" for one year, and it is made unlawful to engage in the business "of placing, installing or operating electrical **wires, appliances, apparatus or construction**" in San Francisco, without first having obtained this certificate of registration.

You ask to be advised whether these different sections apply to electric fixture companies who install, for instance, lighting fixtures after the general electrical contractor has wired a building.

It will be noted that Section 270, above, refers to "all electrical **construction**, all **material** and all **appliances**, * * and the operation of all electrical **apparatus**." The question is, do "appliances", or "apparatus", include "fixtures"?

In the next section, "**appliances**", **apparatus**" and "**construction**", are again specified, "**wires**" are added, and "**material**" is omitted.

Section 272 requires the filing of a contractor's bond in the sum of \$1000 by those who install "electrical **wires, appliances, apparatus or construction**," repeating the language of Section 271.

Section 273 provides for the revocation of a certificate of registration upon defective work being done in the installing of "electrical **wires, appliances, apparatus or construction**," again repeating the language of Section 271.

Section 274 prohibits the installation of any electrical "**apparatus, wires, appliances or construction**," (again so repeating the language of Section 271) without first filing with the Department of Electricity specifications showing the kind and nature of the proposed "**apparatus, wires, appliances or construction**," and securing the written approval of the Chief of said Department, of the intended installation.

Section 275 provides that upon completion of "the **wiring**" of a building a certificate of inspection of the same must be obtained from the Department of Electricity before current will be turned on.

On the one hand, it would appear that the ordinance having omitted the words "apparatus", "appliances", etc., in this section, and referred only to the completion of the "wiring" of the building, the only work requiring a certificate of inspection is the general wiring work. But the section goes on to say, "or shall any **change, alteration or extension** be made in the wiring of the building after inspection without notifying the said Chief and securing a permit thereof."

It might be argued that lights, etc., put in by fixture companies, would constitute an "extension" in the "wiring of the building", and if a permit is required for such an "extension", that the ordinance contemplates the requirement of an inspection of any such work done by fixture companies in the first instance. Furthermore, it might be claimed that the "wiring" is not "completed" until the extensions for the fixtures have been installed.

And the next section, No. 276, makes it unlawful to conceal "any **wires, apparatus or electrical construction**, * * * before the same have been inspected by the Chief of the Department of Electricity, * * *" One purpose of forbidding such concealment is, of course, to enable the Department to properly inspect before issuing a certificate of inspection. And, if "apparatus or electrical construction" include the work of fixture companies, it would appear that such work must receive a certificate of inspection.

Section 277 requires permission to be given inspectors to enter any building "for the purpose of ascertaining whether the electrical **wires, appliances, apparatus, construction or equipment**" (the language of Section 271, with "equipment" added), is in proper condition, and to remove such work as is not, and to order the electrical power for such connection cut off.

Section 278 specifies certain fees that must be paid to the Department for inspection, and among others—

"For one arc lamp, \$0.50."

It is very commonly the practice for arc lamps to be installed by fixture companies, and so a fee is laid down for cer

tain inspection to be done on work of these fixture companies. It may be claimed that this shows that the certificate of inspection described in Section 275 is intended to cover such work.

And, returning to Section 270, which requires that all electrical construction shall be in conformity with the rules and regulations of the "National Electric Code"—an examination of that code shows that it refers to fixture work.

Rule 24 (Sections v, w, x and y) is grouped under the heading "for fixture work" and refers to fixture work.

Rule 26 (Sections a to g) lays down requirements for the installation of "fixtures".

Rule 27 (Sections a to c) deals with "sockets".

Rule 28 (Sections a to g) deals with "flexible cord".

The general purpose of the above described sections of the Building Law is, of course, to safeguard buildings against the risk of fire by reason of defective electrical wiring and construction.

It might be contended that the ordinance requiring "all electrical **construction**, all **material** and all **appliances**" to be in conformity with the "National Electrical Code", and the word "fixtures" being omitted, that the presumption is that the rules in that Code dealing with "fixtures" are not referred to in the ordinance. This takes us back to our first question, do "construction", "material", or "appliances", as used in Section 270 of the Ordinance, and do "appliances", "apparatus", etc., as used in the other sections, include "fixtures"?

In my opinion, the ordinance is not drawn with certainty, so as to permit of my giving a positive answer to your inquiry. There is considerable doubt in my mind, as to whether the courts would hold that the above sections of the ordinance do apply to installation of fixtures.

I, therefore, would suggest that if, in your opinion, the said sections should be made to apply, either in whole, or in part, to these fixture companies, that you bring the matter to the

attention of the Board of Supervisors, as a suggestion for an amendment to the ordinance.

I also call your attention to Section 275, lines 7 and 8, page 124 of "General Ordinances of the Board of Supervisors". It would appear that the words "or extension" should be "of inspection".

Respectfully,

PERCY V. LONG,

City Attorney.

Chief, Department of Electricity.

**Proceeds of Sale of Water Bonds of 1910 May Not be Used
to Extend County Line Water System.**

December 10th, 1910.

Gentlemen: I have your communication of November 15th wherein you ask to be advised whether the proceeds of the sale of water bonds, issue of July 1st, 1910, may be applied to the development and extension of the plant purchased by the City from the County Line Water Company and now owned and operated by the City.

The water bonds referred to are those authorized by the proceedings initiated by declaratory ordinance Number 924, adopted October 25th, 1909. This ordinance declares that the public interest and necessity demand the acquisition, construction and completion of a water supply and designates Lake Eleanor and the waters of the Tuolumne River and its tributaries as available sources for such supply.

The same ordinance directed the City Engineer to procure and file plans and estimates of the cost of construction and completion of such water supply. In accordance with this direction the City Engineer presented detailed plans and estimates for the construction and completion of a water supply, all of which plans and estimates were based upon the Lake Eleanor source of supply.

Thereafter, and on December 13th, 1909, a special election was called for the submission of the question of the acquisition of the water supply and the incurring of a bonded indebtedness therefor to the vote of the people, and, after notice given as required by the Charter, such election was held on the 14th day of January, 1910. The proposition submitted to the electors at such election and approved by them was "to incur a bonded debt of the City and County of San Francisco to the amount of forty-five million dollars for the purpose of the acquisition, construction and completion of a public utility, to-wit: a water supply and works to be owned by the City and County of San Francisco, to furnish to said City and County and to the inhabitants thereof a sufficient supply of water for all purposes, the sources of such supply to be Lake Eleanor, the waters of the Tuolumne River and its tributaries in Tuolumne County, California."

The County Line Water Company was purchased with money from the general fund. At no time has there been a declaration of the Board of Supervisors that the annual revenues are not sufficient to provide for the operation or completion of the system. Until such declaration is made no bonded indebtedness can be incurred. If, under the present condition, the people could not authorize a bonded indebtedness for the extension of the County Line System, they cannot by mere implication, be held to have authorized such expenditure in the election of January 14th, 1910.

The extension of the County Line system is in no way connected with, but is entirely independent of the water supply from the Lake Eleanor and Tuolumne River sources and I am of the opinion that it is too far remote from the main purpose of the bond issue to be entitled to the benefits of the proceeds thereof.

You are therefore advised that the proceeds of the sale of water bonds of 1910 may not be used in the extension of the County Line System.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

**Police Commissioners are Not Empowered to Prohibit any
Member of the Department from Participating in Civil
Service Examinations.**

December 15th, 1910.

Gentlemen: I am in receipt of your communication of even date wherein you ask to be advised whether the Police Commission has the power to adopt a rule fixing a probationary period for promotive appointments, or the right to prohibit any Sergeant to take the examination for Lieutenant, which is to be held on the 17 th of this month.

Practically the same question was involved in an opinion rendered to the Board of Police Commissioners on April 21st, 1908, and found in the printed volume of opinions of the City Attorney of 1908-9, page 94. At that time I advised the Board of Police Commissioners that it was not necessary that a member of the Department should serve a probationary period before he was entitled to participate in any examination for promotion to the next higher rank.

Since that opinion was rendered the Police Commissioners have adopted a rule which requires a six months probationary period upon promotion as well as in the case of an original appointment.

Section 3 of Article XIII of the Charter provides that the Civil Service Commissioners

“Shall make rules to carry out the purposes of this article and for examinations, appointments, promotions and removals.”

Section 8 of the same Article provides that:

“The Commissioners shall provide for promotion in the classified service on the basis of ascertained merit and seniority in service and standing upon examination, and shall provide, in all cases where practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank

established by the Commissioners for each department as desire to submit themselves for such examination .”

From the foregoing it must be apparent that the Civil Service Commissioners have the power to pass rules for promotion and to fix the qualifications required for participants in said examination. No such power has been given to the Police Commissioners and without the power granted it does not exist.

It follows, without argument, that the Police Commissioners have no power to prohibit any Sergeant or any other member of the Department from participating in any examination held in accordance with the Civil Service provisions of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

Ingleside District—Sewerage for—Right of Way over Spring Valley Lands—Purchase or Condemn Same if No Other Route.

December 15th, 1910.

Gentlemen: I am in receipt of your communication of August 26th, 1910, as follows:

“For the purpose of affording an outlet from the Ingleside main intercepting sewer to the Parkside main intercepting sewer, this Board requested the Spring Valley Water Company to grant permission to the City and County of San Francisco to construct a twenty-four (24) inch cast iron pipe across Lake Merced Rancho. Before the proposed agreement be executed, this Board desires to be advised as follows:

1. Has the City and County of San Francisco the right to expend the public moneys in the construction of a sewer over private property?

2. Is the contract proposed by the Spring Valley Water Company to the City and County of San Francisco in the matter of granting a sewer right of way in a temporary location over the Lake Merced Rancho for the purpose of connecting the Ingleside intercepting sewer and the Parkside intercepting sewer, said sewer, to be hereafter taken up and relaid at the expense of the City and County in a permanent location on said Rancho, legally enforceable against the City and County of San Francisco, a municipal corporation?"

Opinion.

Since receiving the proposed agreement accompanying your letter, there has been submitted to me a modified form of agreement between the Spring Valley Water Company and the City and County; the modifications generally being as to matters of time and a permission to use certain trestles of the Spring Valley Water Company and the elimination of the requirement of the bond mentioned in the first agreement.

The proposed modified agreement contains the clause:

"Whenever said real property shall have been subdivided and streets laid out thereupon as hereinabove set forth said party of the second part shall within sixty (60) days after the written demand therefor by the party of the first part, take up and remove said sewer and pipe for its entire distance through the property of the party of the first part, and shall relay the same upon a permanent location, to be determined by the parties hereto, said location to be wholly within the lines of said streets."

The Charter of this City and County does not permit the construction of a sewer upon private property. Every sewer constructed by the City and County must be constructed upon the public streets or when it becomes necessary to construct a sewer over private property, said property must be acquired by the City and County either by purchase or condemnation.

The provisions of the Charter pertaining to the acquisition of private property for sewer rights of way, which rights of way must be perpetual in the first instance, are Sections 6 and 7, Chapter IV, Article VI under the title "Sewers and Drainage", which sections are as follows:

"Sec. 6. The Supervisors may, upon the recommendation of the Board of Public Works, by ordinance passed by not less than fourteen affirmative votes, authorize the purchase of any personal property or the acquisition by purchase or condemnation of any real estate which may be necessary for the construction of any sewer or the making of any improvement provided for in this Chapter.

Sec. 7. The Board may, with the like approval of the Supervisors, agree with the owners of any real estate, upon which it is deemed desirable to construct any sewer or other improvement relative to sewerage or drainage, upon the amount of damage to be paid to such owners for the purpose of such improvement and for the perpetual use of said real estate for such purpose."

The sections above quoted point out the only method of constructing sewers upon private property and the power of the Board of Public Works is there outlined, beyond which it cannot go. It may be, and undoubtedly is true, that the cost of construction of this particular sewer would be increased if constructed over another route than that across the lands of the Spring Valley Water Company. But that fact does not justify your Honorable Board in proceeding in any other manner than that laid down in the Charter.

To carry out the purposes contained in Sections 6 and 7, Section 9 of the same Chapter and Article provides:

"When, upon the recommendation of the Board of Public Works, the Supervisors shall determine upon any improvement for the purpose of sewerage and drainage which necessitates the acquisition or condemnation of private property, and the Board is unable to agree with the owner thereof upon the amount of compensation or damages to be paid therefor, or when such owner is in any way incapable of

making any agreement in reference thereto, and in all cases in which the Board shall deem it most expedient, it shall, when authorized by the Supervisors, expressed by ordinance, have the right to cause said property to be condemned and to institute proceedings for the condemnation of such property, or for the ascertainment of such damages in the manner, so far as the same may be applicable which is provided in this Article for the condemnation of real estate when necessary for the opening of any new street."

I realize the importance of this matter and the necessity of providing a system of sewerage for the Ingleside District, and in an endeavor to arrange this matter on a basis of a permanent and perpetual right of way for said sewer, I have had several conferences with the representative of the Spring Valley Water Company, with a view of obtaining for the City a permanent and perpetual right of way over its lands, but said company would not agree to give a permanent right of way.

The only solution of the question is the acquisition, either by purchase or condemnation, of a sewer right of way over the lands of the Spring Valley Water Company, in the event that it should be found impossible to construct said sewer over any other route, and you are advised accordingly.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Street Railway Company Must Pave Entire Space Between Outside Rails, Irrespective of Whether there are Two Tracks or One Track and Also Two Feet Beyond the Outside Rails.

December 16th, 1910.

Gentlemen: I am in receipt of your communication of November 28th, 1910, as follows:

"This Board desires to be advised as to the following

points, involved in an assessment to be levied in pursuance of the provisions of the Charter for street improvements:

A street railroad corporation having a franchise for single or double tracks on a street, constructed on and along the roadway of such street for a portion of a block thereof, a double track, merging the same into a single track for the remaining portion thereof, as is illustrated by the diagram herewith accompanying. In the assessment to be made for paving the roadway of said street within the said block, what proportion of the improvement of the said roadway is the railroad corporation liable for?

The proportion for which the railroad corporation is liable having been determined, how must the expense of improving the remaining portion of the said roadway be apportioned against the owners of lots fronting thereon with special reference to the tracks, as shown on the said diagram?"

Opinion.

Section 498 of the Civil Code, Subdivision Second thereof, provides that street railroad corporations are required "to plank, pave or macadamize the entire length of the street, used by their track, between the rails and for two feet on each side thereof and between the tracks if there be more than one, and to keep the same constantly in repair, flush with the street.

Under this provision of the law the railroad company owning the tracks upon the street delineated upon the diagram accompanying your communication is liable for the expense of so much of the street work for paving, as lies between the tracks on that portion of the street where there is only one track and for two feet on each side thereof. On that portion of the street where there are two tracks, the company owning same must pay the cost of paving between the rails and for two feet on each side thereof and also the cost of paving between the tracks.

In other words, the company must pay the cost of paving the entire distance from one outside rail to the other, irres-

pective of whether there is one track or two tracks, and for two feet on each side of its roadbed. Where two tracks merge into one, as per diagram, the space on each side of the roadbed for the distance of two feet, following the curve of said tracks, must be paved by the company. The computation of the portion of said street to be paved by the railroad company is a matter for the City Engineer.

You ask how the expense of improving the remaining portion of said roadway must be apportioned against the lot owners after having determined the proportion for which the railroad company is liable. The City Engineer, having computed the portion for which the railroad company is liable, as suggested above, the Board of Public Works may proceed to assess the remaining portion against the lot owners fronting thereon in accordance with the number of feet frontage in accordance with Section 9, Chapter II, Article VI of the Charter, which provides that the expense of said work and improvement shall be assessed upon the lots and lands fronting thereon, each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

**Retail Liquor Dealers Permit—Change of Designation of
Permit—Posting—Consent of Property Owners.**

December 17th, 1910.

Gentlemen: I am in receipt of your communication of December 13th, 1910, which reads as follows:

“We respectfully request an opinion from you on the following matter:

On November 8, 1909, Greenblatt & Cohen applied to this Board for a Retail Liquor permit for the premises located at

the Southwest corner of Polk and Sacramento streets, notice of which application was posted on the said premises on the said 8th day of November, 1909, and after being posted for the ten days required by law, the permit was granted on November 18, 1909; the said permit being renewed each quarter and the license kept alive by the licensees.

On November 28, 1910, the said Greenblatt & Cohen filed an application with this Board, which was heard on the same date, to make alterations in their place of business by installing a bar in connection with the bottle goods department, and the application was granted by this Board on the said date.

Section 3 of Ordinance No. 1038 (New Series) provides that a notice must be posted for a period of not less than ten days on the premises where an application has been made to engage in the business of Retail Liquor Dealer, and inasmuch as the said Greenblatt & Cohen held a Retail Liquor Dealer's permit, this Board was of the opinion that it had the discretionary power, which it has exercised in many other cases to change the designation of this permit from a Sealed Package License Permit to a Saloon Permit, and therefore granted the application without further notice being posted on the premises.

'The point we desire to be informed upon is whether or not this Board has the discretionary power to change the designation of a permit, such as a saloon to a restaurant, or a saloon to a boarding house and bar, etc., without posting notice on the premises which are already covered by a Retail Liquor Dealer's Permit heretofore granted in accordance with the Ordinance.'

It appears from your communication that the license was granted on **November 18th, 1909**, application having been made therefor on November 8th, 1909. Reference is made in your request to Section 3 of Ordinance No. 1038 (New Series), which section, you state, governed you in your action in respect to the license in question. That section, however, does not sustain your action.

Ordinance No. 1038 (New Series), was submitted to a vote of the people at the general municipal election held on November 2nd, 1909, under the provisions of Section 20, Chapter I, Article XI of the Charter relating to the adoption of Ordinances by the initiative. That section of the Charter, among other things, provides that "if a majority of the votes cast upon such ordinance shall be in favor of the adoption thereof, the Board of Election Commissioners shall, within thirty days from the time of such election proclaim such fact, and **upon such proclamation** such ordinance shall have the same force and effect as an ordinance passed by the Supervisors and approved by the Mayor." Ordinance No. 1038 (New Series) received the necessary majority vote at the November election, but the Board of Election Commissioners did not proclaim that fact until **November 30th, 1909**. Under the section of the Charter just quoted the ordinance did not take effect until November 30th, 1909, the date of the proclamation. The license in question having been granted on November 18th, 1909, it must have been so granted under the law as it then stood, that is, under the provision of Ordinance No. 625 (New Series).

Section 3 of Ordinance No. 1038 (New Series) provides that an application "for a permit to engage in business as a Retail Liquor Dealer must be made by the filing of a written application with the Board of Police Commissioners, describing the location of the place where the business is to be carried on and the name and address of the applicant." The section then goes on to provide the procedure to be followed upon the filing of the application. At the end of the section the following language is used:

"The foregoing provisions of this section shall not apply to any Retail Liquor Dealer already established in business, at the time this Ordinance shall go into effect, except, in the event that the Board of Police Commissioners shall refuse to grant a renewal of a license held by an established Retail Liquor Dealer, in which case the same provision shall apply as upon the making of a new application for a permit. All

new applications must conform to the provisions of this section."

By the express terms of Section 3, that Section does not affect the case in question at all so far as the license that is actually held by Greenblatt & Cohen is concerned, and the result of that section is that the status of the license granted to Greenblatt & Cohen on November 18th, 1909, is the same as if Ordinance No. 1038 (New Series) had never been passed. The question, then, is presented, what was the nature of the license granted to Greenblatt & Cohen?

Section 1 of Ordinance No. 625 (New Series) provides:

"Every person, firm or corporation who sells, or, at any fixed place of business in the City and County of San Francisco, gives away or serves any spirituous, malt or fermented liquors or wines or any admixture thereof in quantities less than one quart; and every person, firm or corporation who sells, or, at any fixed place of business in said City and County, gives away or serves any spirituous, malt or fermented liquors or wines or any admixture thereof in any quantity to be drunk upon the premises where sold, given away or served, shall pay a license of five hundred (\$500) dollars per annum, payable in quarterly installments of one hundred and twenty-five (\$125) dollars; said installments to date from the time the permit provided for in this Ordinance is issued."

Under this section two classes of liquor businesses come within its terms; one, the business of selling liquor in less quantities than one quart, but not to be drunk on the premises, and the other, the business of selling liquor to be drunk on the premises.

The provisions of Section 1 of Ordinance No. 625 (New Series) are substantially the same as Section 3 of Chapter III of Article VIII of the Charter relating to the powers of the Board of Police Commissioners at the time of the granting of the permit in question, the Board of Police Commissioners, acting under the provisions of Ordinance No. 625 (New Series)

and the section of the Charter referred to, defined in all liquor permits issued the character of the business that was to be licensed. The notice of application for a permit posted upon the premises, in accordance with Section 10 of the Ordinance, likewise defined the character of the business.

In the case in question, I am advised by the Secretary of the Commission that the application made by Greenblatt & Cohen on November 8th, 1909, was for permission to carry on the business of selling liquor in less quantities than one quart, not to be drunk on the premises; that the notice of the application posted on the premises so stated and that the permit granted on November 18th, 1909, only gave permission to carry on the business of selling liquor in less quantities than one quart, but under the limitation that the liquor was not to be drunk on the premises.

Whether we assume that the Board of Police Commissioners acted within its power in so circumscribing the character of the business to be carried on, or whether we assume that the Board did not have such power, the result is the same. If the Board did have the power, it follows that Greenblatt & Cohen did not, on November 18th, 1909, obtain a permit to carry on a retail liquor business unlimited in its character. If the Board did not have the power, it still follows that Greenblatt & Cohen never obtained such a permit, since the permit actually issued did limit and define the character of business to be carried on under it. If the Board should have either issued or denied a permit to Greenblatt & Cohen, upon their application, not limiting the character of the business to be carried on, then the permit actually issued is void since the Commissioners did not exercise their discretion as to whether they would issue or deny the permit general in its character.

The status of the permit being thus determined, the question arises, does the Board now have the discretion to change a limited permit into an unlimited one? The determination of this question depends upon the provisions of Ordinance No. 1038 (New Series). As already pointed out, Ordinance

No. 1038 (New Series) does not affect permits granted before its passage so far as removals are concerned, but in all other respects the ordinance is to govern. Ordinance No. 1038 (New Series) very largely takes away discretion in the Board of Police Commissioners in granting or refusing permits. Among other things the Ordinance requires that notice of an application for a liquor permit must be posted upon the premises for at least ten days if the application is not accompanied by the written consent of a majority of the property owners owning frontage on the same side of the street and in the same block in which the premises are situated. In this the Board has no discretion. Its discretion is taken away and unless the written consent of the property owners accompanies the application the Board does not have power to issue the permit without first publishing notice of the application, and a permit issued without posting said notice would be void.

From what has been said, it appears that Greenblatt & Cohen do not have a license to engage in the general saloon business of selling liquor to be drunk on the premises. They can obtain that right only in one way, by filing an application with the Board of Police Commissioners under the provisions of Ordinance No. 1038 (New Series). Such an application cannot be treated as an application for the renewal of a permit to carry on the business now proposed. They could not carry on that business under the old permit, but to carry it on now they must obtain a new one. The application, therefore, must be considered as an original application. As an original application it must take the same course as all other original applications, it being expressly so declared in the last sentence of Section 3 of Ordinance No. 1038 (New Series).

I accordingly advise you that unless there is presented with the application of Greenblatt & Cohen the written consent of a majority of the property owners owning frontage on the same side of the street and in the same block in which the premises are situated, notice of the application for the

permit must be posted at least ten days on the premises before the permit can be granted.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

Water Furnished Fire Boat for Use in its Boilers is Chargeable to Appropriation Made for Hydrants.

December 16th, 1910.

Gentlemen: I am in receipt of your communication as follows:

“A question has arisen between the Board of Fire Commissioners and the Spring Valley Water Company with reference to payment for water supplied to the fire boats.

The fire boat station is located at the Harrison Street Wharf and consists of a house with quarters for the men. The fire boats are stationed at said wharf.

The water supplied is used for domestic purposes in the fire house and for the boilers for steam on the boats.

The water furnished for fire houses and stations, which is similarly used for domestic purposes and in the engines for steam, is paid for out of the appropriation of \$20,000.00 for water for public buildings.

As the water supplied the fire boat station is used for the same purposes as that supplied the other fire houses and stations, with the difference that probably a greater quantity is used on the boats, the Board of Fire Commissioners contend that payment therefor should be made out of the appropriation for water for public buildings.

The Finance Committee wishes to be advised whether the fire boat station, with the fire boats attached thereto, can be properly regarded as a public building.”

In order to more properly understand the status of the case I have made inquiry and have been informed of the following facts, which, for the purpose of this opinion, I shall consider as established.

The fire house on the wharf is owned by the City and contains living quarters for the men just as do the other fire houses throughout the City.

This house is furnished with water, through the ordinary water pipes, as are the other fire houses, and in this way water is obtained for domestic purposes in the fire house.

The fire boat does not have any living quarters for the men.

The water furnished for steam in the boilers of this boat is drawn from a hydrant located on the wharf. This hydrant is used solely for that purpose. It is in no way connected with the fire house, the boat getting its boiler water from the hydrant and the house drawing its water for domestic purposes from the ordinary faucets connected in the house.

Opinion.

The Budget for the fiscal year 1910-11 includes the following items:

“GENERAL FUND

SUPERVISORS.

Water for Municipal purposes:

Hydrants	\$130,500
Public Buildings, excepting schools.....	20,000

FIRE DEPARTMENT

Maintenance and expenses.....	152,000
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The fire house on the wharf is without doubt a “public building”, and, if the fire boat drew its water from the boilers directly from this house then I would be of the opinion that the fire boat was connected with the building in the

same way as any fire engine is connected with any fire house, and that the water may well be said to be used in connection with a public building . But the boat gets its boiler water from a separate hydrant, in no way connected with the building.

The Budget was approved June 7, 1910. On June 22, 1910, the Ordinance fixing water rates for the year 1910-11 was approved. This Ordinance is entitled—"Regulating the monthly rates of compensation to be collected by any person, company or corporation engaged in the business of supplying water to the inhabitants of the City and County of San Francisco for family uses, for private purposes, **for municipal uses, and for all public purposes of said City and County** for the year commencing July 1, 1910, and ending June 30, 1911."

Section 1 provides for "General Rates" as follows: "For buildings occupied by a single family covering a ground surface of (not including porches)" etc. etc. Here follows a schedule of ground area covered, and the number of stories of buildings. And then: "The foregoing rates also apply to public buildings." And then follow specific rates for bathing tubs, water closets, etc., including public buildings.

If water used in the fireboat is properly to be considered as water furnished a "public building", then, of course, the appropriation of \$20,000 made in the Budget for "public buildings" is to be looked to for the payment of such water. But I am of the opinion, as above indicated, that this service cannot be considered as the furnishing of water for a "public building."

Section 10 of the Water Rate Ordinance follows:

"Water furnished for any and all purposes not embraced in the above shall be supplied by meter at the following rates:"

Then follow detailed meter rates.

It may appear that the water furnished the fireboat would be included under the above language "water furnished for

any and all purposes not embraced in the above" but Section 11 of the Ordinance provides:

"The rates of compensation to be collected for water supplied by and through hydrants to the City and County of San Francisco shall be two dollars and fifty cents (\$2.50) per month for each hydrant for fire purposes and flushing of sewers."

Now, in this case, we have water furnished a fireboat from a hydrant; this water is for the boilers, and is, in my opinion, certainly furnished "for fire purposes". If a fire engine, at a fire, should run out of water for the boilers and should draw water from a hydrant, it would certainly be drawing such water "for fire purposes", and I can see no distinction between such a case and that which is before me for consideration.

This, then, leads me to the conclusion that the appropriation designated in the Budget under "water for municipal purposes", as

"Hydrants\$130,500"

is the appropriation which is chargeable with the payment for this water.

The only alternative would be to charge it to the appropriation for "Fire Department—Maintenance and expenses —\$152,000." This would follow if we considered that the above language of Section 10 of the water ordinance, "water furnished for any and all purposes not embraced in the above", applied.

I advise you that, under the facts as I understand them, as above set forth, the fireboat station is a "public building", and that the water furnished that house is payable out of the appropriation for "public buildings", but that the water furnished the fireboat for its boilers, from a hydrant separate from this building, is not water furnished a "public

building", but that the payment for said water is chargeable to the appropriation made for "Hydrants."

Respectfully,

PERCY V. LONG,
City Attorney.

Finance Committee, Board of Supervisors.

**Park Commissioners Have No Power to Convey Park Land
in Order to Widen a Street or Avenue.**

December 20th, 1910.

Gentlemen: I am in receipt of your communication of the 19th inst., as follows:

"Enclosed please find copy of resolution presented to the Board of Park Commissioners by the Mission Promotion Association relative to the cession of land by the Board of Park Commissioners for the purpose of widening San Jose Avenue. The Park Commission will be grateful if you will at the earliest possible moment render an opinion as to the authority of this Board in the premises, whether or not they are authorized by law to convey the strip of land, fourteen (14) feet in width for the purpose indicated in the resolution."

Opinion.

The power and authority of the Park Commissioners in relation to the public parks of this City are defined in Article XIV of the Charter and I fail to find therein any provision vesting the Board with authority to convey any of the lands embraced in the parks or set aside the said lands or any part thereof for the purpose of widening any street.

You are advised that your Honorable Board has no power or authority to take any action in the premises, except, possibly, to refer said petition to the Board of Supervisors with any recommendation you may see fit to make.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Park Commissioners.

Failure to Give Notice of Termination of Tenancy Obligates the Tenant to Pay Rent for the Ensuing Month—This Rule is Applicable to City Officers Renting Offices, When no Agreement to the Contrary.

December 29th, 1910.

Gentlemen: I have your communication of December 20th, enclosing statement from the owners of the Mills Building claiming payment of the rent of the offices formerly occupied by His Honor the Mayor in the Mills Building for the month of March, 1910. You ask to be advised "whether the alleged failure of his Honor the Mayor to give formal notice of his intention to vacate the offices on February 26th, 1910, would constitute an obligation to pay the March rent."

In reply thereto you are advised that in the absence of any agreement to the contrary formal notice of the termination of the tenancy should have been given and the failure of his Honor the Mayor to give such notice constitutes a legal obligation against the City for the rent for the month of March, 1910.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Constitutional Amendment No. 1 Deals With Taxation of Property—License Taxes Upon Business or Occupation Are Unaffected Thereby.

January 3rd, 1911.

Dear Sir: I am in receipt of your request for an opinion as follows, to-wit:

"Please advise me on the following points relative to Senate Constitutional Amendment No. 1:

First—At what date should collection of license taxes cease in the cases of Insurance Companies, Bankers, Rail-

roads, Light and Power Companies, Telephone Companies, Express Companies?

Second—What will be the effect of said amendment on collections from parties under License Ordinance No. 756, approved May 28, 1903; also on License Ordinance No. 942, approved July 29, 1903?

From my inspection of Section F of said amendment, it seems to me that December 31, 1910, is the date beyond which collection of licenses should not be made, and if such should be the proper construction, you will see that I need to be informed as early as possible. Yearly licenses are also due on January 1st from vehicle owners; also many quarterly licenses date from same day."

In reply will state that in my opinion Constitutional Amendment No. 1 does not take away the right of the municipality of San Francisco to impose license or occupation taxes and therefore that it has repealed none of the license or occupation taxes in force and effect.

In your request for an opinion you ask "at what date should the collection of license taxes cease in the cases of Insurance Companies, Bankers, Railroads, Light and Power Companies, Telephone Companies and Express Companies?" In reply to this I would state that the collection of these license taxes will not cease. Constitutional Amendment No. 1 deals with the taxation of property. The license taxes in question are business or occupation taxes. They are not property taxes and therefore not repealed by Constitutional Amendment No. 1.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

**When Street and Sewer Work Is Paid For From Proceeds
of a Bond Issue, Such Work if Done in Front of State
Property Is Paid For Out of Such Proceeds.**

January 14, 1911.

Gentlemen: I am in receipt of your communication of November 16, 1910, as follows:

"I am directed by the Board of Public Works to transmit for your consideration the report of the City Engineer and the communication from the Board of State Harbor Commissioners, copies of which are inclosed herewith.

The proposed extension of the Beale Street Sewer has brought up the question of the liability of the State of California through the Board of State Harbor Commissioners for street and sewer work performed in front of property owned by the State and under control of the Harbor Commissioners.

The Board of Public Works desires to be advised if the City of San Francisco is liable for street and sewer work performed either under the bond issue or under the Charter within that portion of the City which is placed under the jurisdiction of the Board of State Harbor Commissioners by Section 2525 of the Political Code."

Opinion.

The liability of the State of California for work done on the streets in the City and County of San Francisco under the jurisdiction of the State Board of Harbor Commissioners is defined and regulated by Section 2525 of the Political Code, which provides that the outer half of such streets must be constructed and built and maintained in good repair by the State Board of Harbor Commissioners, or parties holding under them, and that the inner half of such streets shall be constructed and maintained in good repair by the owners of the lots abutting thereon and the City and County of San Francisco.

It also provides that the Commissioners are authorized to construct across the outer half of such streets an extension of the sewers of the City and County.

The State of California, in the matter of street work, must be considered by your Honorable Board as is any other property owner, and if it should appear that the State is the owner of property abutting on the inner half of the streets which are within the jurisdiction and under the control of the Board of Harbor Commissioners, then the State is liable for its proportion of street and sewer work the same as is any private property owner.

Section 2525, cited *supra*, says that the **cost of street work** on the inner half of streets within the jurisdiction of the Board of Harbor Commissioners must be constructed and maintained in good repair by the owners of the lots abutting thereon, and the City and County of San Francisco, but where it appears that the State is a property owner on the inner half of said streets, it is, under the law, liable for its proportion of said cost.

The foregoing applies to street and sewer work done in the ordinary way by assessment, but where the cost of construction is to be paid with money realized from the sale of bonds issued for that purpose, then the ownership by the State of lots and lands abutting on said streets would cut no figure, for the obvious reason that where the cost of street and sewer work is to be paid for by a bond issue there is no assessment levied upon the property fronting on the streets where said work is done or to be done.

You are therefore advised that the liability of the State of California for street and sewer work performed in front of property owned by the State and under the control of the State Board of Harbor Commissioners is governed by the foregoing.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

A License Tax of \$1200 for Holding Professional Boxing Exhibitions, Paid Voluntarily, Cannot Be Refunded.

January 23rd, 1911.

Gentlemen: I have your request of January 18th wherein you ask to be advised as to the legality of the claim of Morris Levy for the refund of a \$1200 license fee paid for the holding of professional boxing exhibitions during the month of March, 1907.

From the report of your Finance Committee, accompanying the request for an opinion, it appears that on March 11, 1907, a petition was filed by the Hayes Valley Athletic Club for permission to hold a professional boxing exhibition during the month of March, 1907; that this petition was granted and on March 18, 1907, Resolution No. 872 was adopted by the Board of Supervisors granting to the Hayes Valley Athletic Club permission to hold a professional exhibition during the month of March, 1907. This resolution was approved by the Mayor on March 20, 1907. Thereafter, and on March 27, 1907, the license fee of \$1200 was paid by Mr. Levy on behalf of the Hayes Valley Athletic Club for the permit which had been granted on March 18th.

The report further shows that no exhibitions were held during this month and that Mr. Levy states that he was advised by those then in power not to hold any exhibitions.

There is no showing that the permit to hold these exhibitions was ever revoked by the Board, or that any one in authority actually prevented any exhibitions being held. The advice or suggestion of individual members of the Board cannot be deemed a revocation of the permit which was granted by resolution of the Board and approved by the Mayor.

From the facts as suggested, it appears that Mr. Levy is in the same position as any other person who obtains a permit from those in authority to conduct a business or calling, which, without such permit, would be unlawful, and is then unable to make a financial success of it. The fact

that no exhibitions were held may be due to the inability to secure participants, or to the lack of interest on the part of the public in such exhibitions, or to many other causes which the permittee must be deemed to have taken into consideration at the time he petitioned for the permit, and none of which are in any way chargeable to the City or the City authorities. Such being the case, the payment of the license tax must be taken to have been a voluntary payment. Neither the Charter nor the Statutes of the State provide any method for the repayment of a license tax which has been voluntarily paid.

In view of the foregoing you are advised that there is no power in your Board to grant the petition.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

A Citizen Has the Right to Inspect and Have Copies of the Public Records in the Office of Superintendent of Schools.

January 24th, 1911.

Sir: I have your communication of January 16th wherein you ask to be advised as to the rights of a citizen to inspect or copy the records of your office.

Section 1892 of the Code of Civil Procedure reads as follows:

“Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute.”

Section 1893 of the Code of Civil Procedure provides as follows:

“Every public officer having custody of a public writing, which a citizen has a right to inspect, is bound to give him,

on demand, a certified copy of it, on payment of the legal fees therefor."

Section 1032 of the Political Code reads as follows:

"The public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of this State. In all actions for divorce, the pleadings, and the testimony taken and filed in said actions, shall not be by the clerk with whom the same is filed, or the referee before whom the testimony is taken, made public, nor shall the same be allowed to be inspected by any person except the parties that may be interested, or the attorneys to the action, or by an order of the court in which the action is pending; a copy of said order must be filed with the clerk. In cases of attachment, the clerk of the court with whom the complaint is filed shall not make public the fact of the filing of such complaint, or of the issuing of such attachment, until after the filing of return of service of attachment."

From the foregoing it is apparent that a citizen is entitled not only to inspect, but to have copies of the public records of your office.

Respectfully,

PERCY V. LONG,
City Attorney.

Superintendent of Schools.

**Until the Rules of Civil Service Commissioners are Amended
Engineers of the Fire Department Cannot Participate
in Examination for Promotion to Lieutenant.**

January 25th, 1911.

Gentlemen: I have your communication of January 24th, wherein you ask to be advised whether your Board may permit the Engineers of fire engines, having the necessary qualifications, to participate in the examination for promotion from

the rank of Firemen to the rank of Lieutenant in the Fire Department to be held February 4th, 1911.

Section 8 of Article XIII of the Charter provides that all examinations for promotion shall be competitive among such members of the next lower rank established by the Civil Service Commissioners for each department as desire to submit themselves to such examination.

From the rules established and published by your Board for the year 1910, as required by Article XIII of the Charter, it appears that the members of the Fire Department have been classified in the following manner:

Class:

- I—First Assistant Chief Engineer.
- II—Second Assistant Chief Engineer.
- III—Battalion Chiefs.
- IV—Superintendent of Engines.
- V—Engineer (Fire Engines.)
- VI—Captains.
- VII—Lieutenants.
- VIII—Firemen (including Drivers, Stokers, Tillermen, Truckmen and Hosemen.)
- IX—Hydrantmen.
- X—Superintendent of Horses.

This classification closely follows the classification made by the Charter, Section 1, Chapter VIII of Article IX, which is apparently made on the basis of the salary to be paid to the members of the various classes. In order to comply with the provisions of Section 8 of Article XIII your Board has in the published rules, above mentioned, established the classes and ranks in the Fire Department to govern the examinations for promotions; such classification is as follows:

- 1—Firemen to Lieutenant.
- 2—Lieutenants to Captains.
- 3—Captains to Battalion Chiefs.
- 4—Battalion Chiefs to Second Assistant Chief Engineer.
- 5—Second Assistant Chief Engineer to First Assistant Chief Engineer.

This classification for promotion seems to be confined to the members of the fire fighting service as distinguished from those of positions such as Superintendent of Engines, Engineers, Superintendent of Horses, who have special duties to perform which, however important they may be, cannot be termed strictly a part of the fire fighting service. The classification for promotion which designates the rank of Firemen as that next below the rank of Lieutenant must be read in connection with the former definition of Firemen as including Drivers, Stokers, Tillermen, Truckmen and Hosemen.

Inasmuch as your Board has established these classifications by rules, which have been adopted and published in accordance with the provisions of Article XIII of the Charter, I am of the opinion that until such rules are amended so as to include Engineers in the rank of Firemen you are without power to adopt the resolution, suggested in your communication, authorizing Engineers to participate in the examination for promotion to the rank of Lieutenant.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

As to Reasonableness, Practicability and Constitutionality of an Ordinance Prohibiting the Collection of any Fare in Excess of 3 cents from any Passenger of a Street Car Unless Such Passenger is Furnished with a Seat—Power of the Board of Supervisors.

January 30th, 1911.

Gentlemen: I am in receipt of your communication of January 5th, 1911, in which you ask to be advised "as to the construction and sufficiency" of the following proposed ordinance:

“BILL NO. 1583. ORDINANCE NO... (NEW SERIES)
PROHIBITING THE COLLECTION FROM ANY PASS-
ENGER OF ANY STREET CAR OF ANY FARE IN
EXCESS OF THREE CENTS UNLESS SUCH PASS-
ENGER SHALL BE FURNISHED A SEAT AT THE
TIME OF ENTERING A CAR.

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. It shall be unlawful for any person, company or corporation operating a street railroad in said City and County, to charge or collect from any passenger on any street car a fare to exceed three cents, unless such passenger shall be provided with a seat at the time of entering and taking a passage in a car.

Section 2. Every person, company or corporation violating the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding \$500.00 or by imprisonment in the County Jail not exceeding six months, or by both such fine and imprisonment.

Section 3. This Ordinance shall take effect and be in force from and after its passage.”

I assume that you mean by “construction and sufficiency” the constitutionality of the proposed legislation.

The ordinance is a direct attempt to fix fares of a street railroad by dividing passengers into two classes, one, those who are provided with seats, and the other those who are not so provided. As to the latter class it is proposed to reduce the present rate of fare from five cents to three cents.

The validity of this legislation depends upon two questions. First, has the Board of Supervisors the power to regulate the rate of fare of the present street railroad companies of the City, and Secondly, is the proposed regulation a reasonable one both as to its creation of classes of passengers and as to the rate allowed to be collected?

That the State has the power to regulate the charges of corporations and individuals engaged in a public service business, has long been settled as beyond any doubt. It is a governmental power belonging to sovereignty and is legislative in its character. Many courts have classed this power as among the "police powers" of the State, giving to the indefinable term "police power" the broad significance of those matters which inherently pertain to public safety and welfare.

Regulation of charges of Public Service Corporations being governmental, it is within the power of the State to invest municipalities of the State with that power so far as pertains to the regulation of rates within the municipalities.

In Section 27 of Chapter II of Article II of the Charter the power is conferred upon the Board of Supervisors "to fix, establish and reduce the fares and charges for transporting passengers and goods" of street railways. So far then as the power being invested in the City is concerned the Board of Supervisors has been granted explicit power to fix rates of street railways.

Practically all franchises, however, now held by street railway companies in San Francisco were granted before the present city charter went into effect and practically all of them contain the provision that "the rate of fare for each passenger *shall not exceed* the sum of five cents each way." The quoted words are from Order No. 1514 granting the Market Street franchise, September 20th, 1879.

A franchise has again and again been declared by the courts to be a contract between the municipality granting the franchise and the grantee. As a contract a municipality cannot abrogate or change, without the consent of the holders, any stipulation or agreement contained therein which has been entered into within the legal power of the municipality. In that respect a franchise possesses all the legal characteristics of any other lawful contract made by a city.

The right of a city to legally bind itself as to any stipulation in a franchise or other contract depends upon the powers with which it has been clothed by the State. It is a

fundamental proposition, of which you have been frequently advised, that a municipality of this State has only those powers which have been bestowed upon it by the State, through the Constitution and Legislature and its Charter, and those implied powers which are necessarily incidental to the express powers granted.

Is the stipulation in the franchises of our street railways that "the rate of fare shall not exceed five cents" an agreement between the city and the holders of these franchises that a five-cent rate of fare may be charged, or is it merely a declaration in those franchises in the way of a limitation upon the rights granted under the franchises that more than "five-cent fare shall not be exacted," leaving to the City or State the right to exercise the governmental power of fixing rates and reduce the rate of fare if the City or State so desires? If the stipulation amounts to an agreement that the grantees of the franchises could always charge a five-cent fare, the validity of such an agreement must depend upon whether the Board of Supervisors in granting the franchise had the power to bind itself with such an agreement.

As already stated, the right to regulate rates to be charged by a person or corporation engaged in a business affected with a public use is a governmental power of the highest nature. As was said by Justice Field in *Georgia R. & Banking Co. vs. Smith*, 128 U. S., 174, 32 Law Ed., 377:

"This is not a new doctrine, but old doctrine, always asserted whenever property or business is by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this Court in some cases as to circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in *Munn vs. Illinois*, 94 U. S., 113, 126, 139, 146 (24: 74, 84, 89, 91); but none as to the doctrine that when such use exists the business becomes subject to legis-

lative control in all respects necessary to protect the public against danger, injustice and oppression." (Page 380, Law Ed.).

It is as equally well settled that the power of regulation of rates cannot be suspended by a contract with a public service corporation unless the express and unequivocal power has been conferred upon the governmental agency attempting to do so.

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank vs. Billings*, 4 Pet., 514, 561; 7 L. Ed., 939, 955, "its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." This rule is elementary and the cases in our reports where it has been considered and applied are numerous. *Railroad Commission cases*, 116 U. S., 307. Sub. nom. *Stone vs. Farmers' Loan & T. Co.*, 29 L. Ed., 636 (quoted in *Freeport Water Co. vs. Freeport*, 180 U. S., 598; 45 L. Ed., at 688).

In *City of Cleveland vs. Cleveland City Railway Company*, 194 U. S., 517, 48 L. Ed., 1102, the identical question presented in your request came before the Supreme Court of the United States. In the *Cleveland* case the ordinances for the consolidation and extension of street railways in Cleveland contained the stipulation, the same as are found in the San Francisco street railway franchises, "for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected." The ordinances further provided that before the consolidation could become operative a written acceptance of the terms of the ordinances allowing the consolidation should be filed by the companies, which was done.

After the consolidation had gone into effect the City of Cleveland passed an ordinance reducing the rate of fare of these consolidated companies to four cents. The right to so reduce the rate of fare was challenged in the United States Supreme Court upon the ground that the ordinance reducing the fare resulted in an impairment of the contract entered into between the City and the railway companies in the consolidated ordinances. The Supreme Court in its opinion reviewed the history of the Cleveland franchises and the acts of the companies and the city leading up to the consolidation and held that the stipulation that no greater fare than five cents should be charged constituted a contract between the city and the street railroads which gave to the consolidated railroads the right to charge a five-cent fare and that in entering into this stipulation the City was acting within its powers. Any attempted reduction, therefore, by the city of the rate of fare to be charged impaired a binding agreement that had been made by the city with the railroads. In reaching this conclusion the Supreme Court followed its previous decision in *Detroit vs. Detroit Citizens' Street R. Co.*, 184 U. S., 368, 46 L. Ed., 592, 22 Sup. Ct. Rep., 410.

In the *Detroit* case the franchise granted by the city contained the provision that "the rate of fare for any distance shall not exceed five cents," the language being practically identical with the language of our street railway franchise. This franchise had been granted under the law of Michigan which conferred upon municipalities the power to grant street railway franchises. Section 20 of this Act provided that "the rates of toll or fare which any street railway may charge for the transportation of persons or passengers over their roads shall be established by **agreement** between such company and the corporate authorities of the city or village where the road is located."

Detroit had, therefore, the power to bind itself by an agreement as to the amount of fare that could be charged by the street railroad company, and having that power the city could not change the rate of fare when once it had

entered into an agreement as to such rate. In so holding the Supreme Court fully recognized the principle hereinabove stated, that in order for a city to bind itself so as not to be able thereafter to exercise its governmental power to fix rates the power to do so must be expressly conferred upon it. And in a subsequent decision the Supreme Court has referred to the Detroit case as in no wise being contra to this proposition. (See *Freeport Water Co. vs. Freeport*, 180 U. S., at 598, 45 Law Ed., at 688.)

In one of the very latest cases of the United States Supreme Court on this question of the power of a city to suspend its governmental power to fix rates, the Court said:

“The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point.

It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit vs. Detroit Citizens' Street R. Co.*, 184 U. S., 368, 382, 46 L. Ed., 592, 605, 22 Sup. Ct. Rep., 410; *Vicksburg Waterworks Co.*, 206 U. S., 496, 508, 51 L. Ed., 1155, 1160, 27 Sup. Ct. Rep., 762. But for the very reason that such a contract has the effect of extinguishing pro tanto an

undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." (Home Teleph. & Teleg. Co. vs. Los Angeles, 53 L. Ed., 176, at page 182. See also City of Indianapolis vs. Navin, 47 N. E., 525.)

This logically leads us to the question whether the City of San Francisco at the time the present franchises were granted was invested with the express power by the State to enter into a valid stipulation as to the rate of fare to be charged by the grantees of those franchises which suspended during the life of those franchises the right of the City to regulate the rates of fares.

As pointed out, practically all the present street railway franchises of the City were granted before the adoption of the Charter under the general laws of the State, as found in Title IV, Part IV, of the Civil Code.

Under the law as it then stood there was no authority conferred upon municipalities of the State to suspend by contract the power to regulate rates of street railways. On the contrary, the State itself, in Section 501 of the Civil Code, by general law exercised its governmental power by limiting the amount of fare of street railways where franchises were granted under the provision of Title IV, Part IV, of the Civil Code.

In 1878 the Legislature also passed an Act applicable to San Francisco, providing that "no street railroad in any city or town of this State of more than one hundred thousand inhabitants shall be allowed to charge or collect a higher rate of fare than four cents for each passenger."

Neither Section 501 of the Civil Code nor the Act of the Legislature referred to can be said to have conferred upon the City the right to fix rates by contract so as to thereafter prevent the State or City from changing them. Both statute and code sections are self-operative and do not refer to the granting of any franchise, but are simply the exercise of the power on the part of the State to fix street railway fares.

Had no reference whatever been made in the franchises as to the amount of fare that could be charged, the State Act would still prevent a charge of more than five cents. The provision, therefore, of the franchises that the rate of fare should not exceed five cents was of no additional force and was undoubtedly placed therein out of an abundance of precaution. I am, therefore, of the opinion that in view of the authorities cited, the provision of the franchises, as to rate of fare to be charged, does not amount to a binding obligation on the part of the City not to exercise, during the lives of the franchises, its governmental power to fix rates.

Whether we consider the language used in the franchise as amounting to an attempted contract as to rates or not, the result is the same. If it is not an attempted contract, but is merely a limitation following the law of the State as to the maximum rate, and not of contractual force, the power of the City to now regulate the rates clearly exists. If it was an attempt to create a binding contract between the City and the grantees of the franchises as to rates, the Board of Supervisors in entering into the contract did not have the power to so bind the City and the contract therefore was *ultra vires*.

The power to pass the ordinance in question, as already pointed out, depends upon whether the Board of Supervisors has the power to regulate the rates of our present street railroads. I am of the opinion that the Board has the power of regulation, but the validity of the ordinance in question must depend upon its reasonableness. Upon that question the Board of Supervisors must judge. The company is entitled to a fair return upon its investment and if the reduction amounts to such a loss of income as will take away that fair return, the ordinance cannot stand. In determining that question, you proceed in the same manner and on the same basis as you fix telephone, gas and water rates.

An ordinance of this kind must also be practicable. If it cannot be put in execution it is unreasonable. As to whether it is so or not I do not pass upon. That is for your judgment. I am of the opinion that the creation of two classes

of passengers is proper in itself, since it is apparent that a passenger who is provided a seat receives a greater service than one who is not, and whether or not the provision for different rates of fare for those classes can be enforced and is practicable possibly can only be determined by an actual trial of the ordinance.

These are matters, however, upon which you must pass. I am of the opinion that the ordinance cannot be said to be unreasonable upon its face, and that it is within the power of the Board of Supervisors to pass this ordinance.

There is one suggestion, however, that should be made in this connection. If the purpose of the ordinance is to force the railroad company to put on more cars the passage of the ordinance in question is not necessary to accomplish this object. "The frequency with which cars should be run for the public convenience, and the details of the conduct and operation of the railways, which experience might show to be necessary," are matters fully within the power of the Board of Supervisors to control. In the interest of the public and for its protection and accommodation the Board of Supervisors may require more cars to be run on a given line, provide a schedule for the cars of a given line, and can limit the number of passengers that may be carried.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Locust Avenue (Now Redwood Street) Between Laguna and Buchanan Streets (W. A. Block 225) Is an Open Public Street.

January 30th, 1911.

Gentlemen: I am in receipt of your communication of the 5th inst., as follows:

"The Board of Public Works, by Resolution 8966 (Second Series), requests that it be furnished with an opinion as to

whether or not Locust Avenue (now Redwood Street), from Laguna Street to Buchanan Street, is an open public street. Your attention is called to the enclosed copy of the report of the City Engineer on a petition requesting that this street be opened."

Opinion.

Redwood Street, formerly Locust Avenue, in Western Addition Block No. 225, from Laguna Street westerly along the northerly line thereof to a point distant one hundred and ten (110) feet easterly from Buchanan Street; thence at an angle southwesterly to a point on the southerly line of said Redwood Street distant about eighty-seven (87) feet ten (10) inches easterly from Buchanan Street, is an open and public street, having been offered for dedication by Thomas Hayes, the owner of the tract embracing said Redwood Street, by the filing of a map in the Recorder's office in this City and County on March 8, 1860, said offer being accepted by the adoption of the Humphrey Map of 1870.

The land lying easterly from Buchanan Street to the points mentioned above was not embraced in the Hayes Tract. There is no record of any offer of dedication by the owner or owners thereof, and while said land appears on the Humphrey Maps of 1870 and 1878, and the official map of 1899, as a part of Redwood Street, yet this fact does not determine whether it is a part of said street.

It depends upon proof that it had been offered for dedication as a public street and had been accepted by user or otherwise. This doctrine has been firmly established by the courts.

It appears that one F. A. Vandercook was the owner of Lot 4 situated on the southeast corner of Golden Gate Avenue and Buchanan Street. On February 12, 1864, he conveyed said lot in four separate parcels 27 feet 6 inches on Golden Gate Avenue with a depth of 120 feet. On the same day he conveyed the southerly 17 feet 6 inches of said lot to all his grantors in common, not giving to each the portion ad-

joining his own lot. This was done, apparently, for the purpose of providing a private right of way 17 feet 6 inches in width by 110 in depth, running from Buchanan Street easterly 120 feet southerly from Golden Gate Avenue. This being a grant to private parties, delineation on a map would not make it a public street.

The title to that portion of what would be Redwood Street, if extended, commencing at a point on the easterly line of Buchanan Street distant 120 feet westerly from the northerly line of McAllister Street, running thence northerly 17 feet 6 inches; thence at right angles easterly 95 feet 4½ inches; thence at right angles southwesterly to a point on the southerly line of Redwood Street distant about 87 feet 10 inches, easterly from Buchanan Street and thence westerly at an angle, about 87 feet 10 inches to the easterly line of Buchanan Street and the point of commencement, was quieted by John M. Burnett, on June 7, 1905, in an action against the City and County of San Francisco.

You are advised, therefore from the records at hand that Redwood Street, in Western Addition Block No. 225, is an open public street from Laguna Street westerly along the northerly line thereof to a point distant easterly 110 feet from Buchanan Street; thence southwesterly to a point on the southerly line of Redwood Street, distant about 87 feet 10 inches easterly from Buchanan Street for its entire width of 35 feet. I express no opinion as to whether any part of said land lying easterly from Buchanan Street to the points indicated has ever been dedicated as a public street by user by the public for the length of time required by law, as that is a question of fact, requiring the examination of witnesses under oath.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Firemen Must Furnish Substitutes, at Their Own Expense,
While Standing Civil Service Examinations for Promo-
tion.**

January 31st, 1911.

Gentlemen: I am in receipt of your communication of even date herewith which reads as follows:

“This Commission will hold an examination for promotion in the Fire Department from the rank of Fireman to the rank of Lieutenant on Saturday, February 4th, 1911.

“Three hundred and sixty firemen have filed applications to take said examination.

Will you kindly advise this Commission as to whether or not the Board of Fire Commissioners have the right to require the above mentioned applicants to furnish substitutes at their own expense during their absence from duty on the date of said examination?”

In reply thereto you are respectfully advised that although all examinations for promotion under the classified civil service are open and free to all persons holding the next lower rank, this does not contemplate that the public business of the municipality should be stopped or the public welfare endangered for the purpose of holding such examinations.

If, therefore, members of the Department desire to participate in any examination for promotion in the Department, it is both proper and reasonable that the Board of Fire Commissioners should require such persons to furnish, at their own expense, a substitute to perform their duties during the time they are engaged in such examination. This, of course, would not apply to any member of the Department whose regular leave of absence should fall upon the day of the examination.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

Great Highway Is Dedicated as a Boulevard and Supervisors and Park Commissioners Are Prohibited by the Charter from Granting Any Franchise or Permit to Construct a Railway Thereon.

January 31st, 1911.

Gentlemen: I am in receipt of your communication of the 24th inst. in which you ask to be advised as to whether the Board of Supervisors can grant to the Great Highway Development Company permission to construct a railroad over a portion of the Great Highway, the same to start near the Cliff House and to end at the Sloat Boulevard.

You also inquire whether the Park Commissioners can grant such a permit.

You enclose a form of agreement proposed to be entered into between the said Great Highway Development Company and the Park Commissioners of this City and County, in which it is set forth that the road is to be a scenic railway; that the permit is to last for a term of twenty-five years; that the permittee will carry certain supplies, material, rock, dirt, etc., for the Park Commissioners free of charge along said railroad; that the permittee will at the expiration of said twenty-five years convey, grant, deed and transfer unto the said Park Commissioners all of said railway property, machinery, etc., at the option of the said Park Commissioners, and that at any time during the life of the contract the said permittee would so transfer over to said Park Commissioners all of its property above referred to, upon the demand of the said Park Commissioners, upon the payment therefor, by the said Park Commissioners, of the value of the said property, said value to be determined by arbitration as provided in said agreement. And several other terms along the same lines are included.

Opinion.

FIRST: THE POWER OF THE PARK COMMISSIONERS TO GRANT SUCH PERMIT.

Article XIV of the Charter deals with the Park Commissioners. Section 1 reads as follows:

“The lands designated upon the Map of Outside Lands of the City and County, made pursuant to Order No. 800, by the word “Park,” extending from Stanyan Street to the Pacific Ocean, and known as Golden Gate Park: * * * Also that certain highway bounded on the west by the Pacific Ocean, and designated upon said map as ‘Great Highway’; * * * shall be under the exclusive management of a Board of Park Commissioners who shall be known and designated as Park Commissioners, * * * ”

In describing the Great Highway the Charter makes reference to Order No. 800 of the Board of Supervisors; this Order approved, January 14, 1868, provided for a survey and mapping of the Outside Lands of this City, and for the selection from these lands, of various public reservations. Section 6 of this Order, referring to the map so directed to be made, states:

“ * * * The tract or portion of land set apart and designated on said map as a public park, * * * shall be deemed absolutely dedicated as such.”

Section 9 provides:

“All that portion of the land described in Section 1 of this Order which lies South of the line drawn due South, 81 degrees and 35 minutes, East, magnetic, through Seal Rock, and West of a line easterly not less than 200 feet from ordinary high-water mark, is hereby reserved and set apart for public use as a public highway.”

Reading Section 1 of this Order No. 800, so above referred to, we see that this description of the Great Highway specifies all that portion of the lands within the limits of the City and County of San Francisco above the ordinary high-water mark of the Pacific Ocean, as the same existed on the 7th day of July, 1846, which lies South of a line drawn due South 81 degrees and 35 minutes East, etc., etc., as above set forth.

We then see, in the first dedication of the Great Highway, that it is especially reserved as a public highway, and this, in

connection with the history of the passage of this Order and its subsequent approval by the Legislature of the State of California, as hereinafter particularly described, shows a clear intention to reserve this Highway as a boulevard to be used by the general public for driving, walking and pleasure purposes.

It will not be necessary for me to go into the question which suggests itself as to whether that portion of the Great Highway immediately fronting the westerly terminus of the Park is not in fact a portion of the main body of the Park itself.

The Legislature of the State of California, by statute approved March 27, 1868, (Stats. 1867-8, p. 379), set forth this Order No. 800 of the Board of Supervisors in full, and ratify and confirm the same.

In ascertaining the intention of the Board of Supervisors in this matter, we receive considerable light by the reading of the report of the majority of the Supervisors' Committee on Outside Lands filed May 18, 1868, in which report there was presented "a map of the Outside Lands, showing the lots and portions of land set apart for public use * * * "

An inspection of this Map shows the main body of the Park designated as "Park," and the Great Highway as it is now known running along the Ocean Shore and designated "Great Highway."

(The information given below concerning the proceedings of the Board of Supervisors, is to be found in Municipal Reports of San Francisco, 1867-8, appendix, and in the compilation of Harold Wheeler, attorney of the Board of Park Commissioners, published in 1894, and entitled "Statutes, Ordinances and Laws relating to the Park Commissioners of the City and County of San Francisco.")

This majority report stated that the Committee was not able to unanimously agree upon the question of Park Reservations, but that it was unanimous upon certain propositions, and among others "that it (the Park) should extend to the Ocean beach."

“That it should be situated so as to include at least a part of the tract finally selected by a majority of the committee. And it is proper that the general reasons which made those propositions acceptable to the committee should be stated before we enter upon the consideration of matters upon which there was not an unanimous agreement. * * * ”

“Second: As to the Ocean boundary or terminus. The object of a public park is such that it should unite as far as possible every element of natural beauty, to combine every means of recreation and enjoyment. With the eastern portion of the park cultivated and decorated in the highest style of landscape gardening and architecture, the now desert and drifting sand dunes transformed, as it is now demonstrated they may be, into pine forests, *and the drives and riding paths connected with one of the finest beach drives in the world, every phase of attraction and usefulness* of which such a place of recreation is capable, will be presented.”

We see there, a clear intention that the Great Highway should be in essence a driveway for pleasure purposes. Then, referring to the question of communication between the sections of the City to the North and South of the Park, this majority report goes on to say:

“*Of course the park cannot be used for purposes of business and traffic.* It therefore becomes absolutely necessary to leave sufficient space somewhere between the hills on the south and the cemeteries on the north for business communication between the two sections. For this reason alone we deem it wholly impracticable to extend the eastern line of the main park further east than Stanyan Street. Indeed, it is a question whether it would or would not be better to make First Avenue the eastern boundary.”

The Outside Lands Committee intended that no part of the Park itself should be used by street railroads, and, of course, the same purpose would control the Great Highway, reserved as a boulevard.

The final report of the Committee on Outside Lands, as to certain changes in these reservations for public use, was filed June 22, 1868.

On that same day the Board of Supervisors passed Resolution No. 8565, approving this final report on changes, and on July 13, 1868, Resolution No. 8622 was adopted, which, in referring to the above final report of the Committee on Outside Lands making certain changes on the Map of Outside Lands, went on to provide that—

“* * * the said final report of said committee be and the same is hereby approved, ratified and adopted, and that under and by virtue of the provisions of the said Order No. 800, the said map has become and is the official map of the Outside Lands; and all the lots and parcels of land set apart for public uses as thereon designated, have become and are absolutely dedicated to the uses for which they have been so severally set apart and designated.”

Here, then, was a dedication of the Great Highway as such for boulevard purposes.

And, to do away with any doubts whatever, Order No. 823, “approving of the Acts of the Committee on Outside Lands, and ratifying their final report on the map and reservations,” was approved July 24, 1868.

By Act of the Legislature approved March 11, 1874, (Stats. 1873-4, p. 333), Section 1 provided:

“* * * That strip of land bounded on the west by the Pacific Ocean, referred to in the first section of an Act of the Legislature of this State, approved March 27, 1868, (the Act above described as approving Order No. 800) * * * which is particularly described in the ninth section of the Order confirmed by said last mentioned Act, and which, on said official map, is designated as ‘Great Highway,’ shall be hereafter known and designated by such name.”

This gives us, again, a particular reference by the Legislature of the State to the Great Highway, and in effect this

shows an additional recognition of the said Highway as a public boulevard.

Of course, such a boulevard cannot be by the Park Commissioners so used as to change the dedication from the purposes originally designated.

In *Spires vs. City of Los Angeles*, 150 Cal. p. 64, the Supreme Court held that the erection of a building for public library purposes in a public park is a legitimate use of a portion of the park, but that said building could not be used for general municipal administrative purposes, since this would not be a use tending to the pleasure and entertainment of the public.

It is manifestly true that to permit a street railroad being conducted for private gain, to be operated upon a boulevard, or in a park, would not come within the original intention of reserving such a boulevard or park for purposes of pleasure and entertainment, and in particular this would not come within the purpose of reserving such a boulevard as a beautiful scenic driveway along the Ocean Shore of this City and County to be so used by our citizens generally.

While not directly affecting San Francisco, the general Park Boulevard, and Highway Acts of this State are interesting as showing the general purpose of the Legislature to forbid any street railroad to be operated upon such properties. On March 14, 1889, (Stats. 1889, p. 143), the Legislature passed a Statute, by Section 6 of which it was provided that it should be lawful for every Board of Park Commissioners to let or lease any portion of the lands or parks under their control for terms not exceeding three years, until the grounds so leased shall be required for the improvement of such parks, etc.

On March 24, 1893, (Stats. 1893, p. 343), an additional prohibition was included in the above section, prohibiting any portion of such park to be leased to any street or other railroad company.

An Act of the Legislature approved March 22, 1905, (Stats. 1905, p. 754) provides for the formation of Boulevard Dis-

tricts, by vote of the people of such districts, and the construction, maintenance and use of boulevards, and this Act prohibits the granting of a franchise for the running of cars or vehicles upon fixed tracks or rails upon such boulevards.

The Act of March 19, 1907, (Stats. 1907, p. 666), providing for a bond election in the matter of highway purposes, prohibits any railroad, electric road or street railroad being constructed along or upon any highway or any portion thereof immediately under the provisions of said Act.

We see then, from the general definition of a boulevard which has been accepted in law, that the Great Highway was intended to be such a road, and that a permit to allow a railroad to be constructed upon it, would change its character from that of a boulevard to that of an ordinary street.

We saw above, that Section 1 of Article XIV of the Charter gives "the exclusive management of the Great Highway" to the Park Commissioners; Section 6 gives the Commissioners "complete and exclusive control, management and direction of the aforesaid parks, squares, avenues, and grounds, and the exclusive right to erect, and to superintend the erection of, buildings and structures thereon; * * * except as provided in Section 9 of this Chapter, nothing in this section shall be so construed as to authorize the Commissioners to lease any part of any of said parks, squares, avenues and grounds to any person, company or corporation for any purpose; *or to permit any person, company or corporation to build or maintain any structure on any part of said parks, squares, avenues or grounds:*" and then follows certain exceptions such as the leasing of a building for park pleasure purposes, and the using of the park for exposition purposes.

Section 9, above referred to, authorizes the Board of Park Commissioners to lease to the State of California grounds in Golden Gate Park for a State Exposition building.

Section 12, added at the recent Charter Amendment election, gives permission to the Academy of Sciences to erect a free museum in the Park.

We therefore have in this Section 6 a specific prohibition against permitting any company "to build or maintain any structure on any part of said park, squares, avenues or grounds." This, of course, is a statutory prohibition in addition to the prohibition which we have discussed, resulting from the dedication of the Great Highway as a boulevard.

SECOND: THE POWER OF THE BOARD OF SUPERVISORS.

The reasons first above suggested which in law prevent the change of the use of the Great Highway as a boulevard, apply, of course, with equal force in considering the powers of the Board of Supervisors over this general subject. The Board of Supervisors has no more power than has the Board of Park Commissioners to permit such a boulevard to be used contrary to the intention of its original dedication.

However, an examination of that portion of the Charter dealing with the powers of the Supervisors adds additional light to our subject. It is apparent that the grant of any such privilege as is here sought would be the granting of a franchise. It is of no material interest to say that it is proposed to include in the granting of this permit certain conditions, as for instance, the right of the City to acquire the property of the railroad company at the expiration of the twenty-five years, etc, etc. Any such use of a street, or boulevard, or highway, as is here asked for, is a franchise because it is such a use as citizens generally do not have at common law. The privilege is asked to tear up the Highway and place tracks thereon and to operate cars upon the same and charge toll of people using such cars. In order to gain any such rights permission must first be granted by the State as a sovereign power, or by the City as agent for State sovereignty.

In *DeWitt vs. Hays*, 2 Cal., 463, there was a contract made between the Commissioners of the Sinking Fund of the City of San Francisco, and Roberts & West, by which the said Commissioners granted to the said Roberts & West, the right to carry out the wharf on Pacific Street, to a point designated,

and make other improvements in connection therewith, described in the said instrument; and granted to the said Roberts & West the exclusive right to use a certain space described in the agreement, on Pacific Street, for wharfage and anchorage of vessels, etc. And the right to charge wharfage within the said space mentioned for five years to commence at a specified period. And the said Roberts & West covenanted, at the expiration of the said five years, to relinquish to the City in fee simple, all improvements made by them by virtue of the grant without charge for remuneration, and to pay to the said Commissioners 10 per cent of the gross receipts of said wharf during said five years.

Speaking of this privilege granted to Roberts & West, to a use of a city street, the Supreme Court said, at page 468:

“The right of the plaintiffs in the premises is simply a right to collect wharfage and dockage for a certain term of years, and is neither real estate nor personal property, but a franchise or incorporal hereditament, an uncertain profit issuing out of the realty.”

Spring Valley W. W. vs. Schottler, 62 Cal., 107.

In the last case our Supreme Court said:

“The definition of franchises as special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally by common right, had its origin in *Bank of Augusta vs. Earle*; 13 Pet. 575. * * * there are privileges granted to the water works, which do not, by common law, belong to citizens generally; such as the right to lay down pipes in the streets, ways and alleys of the City, and to collect rates for water * * *. They are vested by a grant of the sovereign power, and not the common law.”

To the same effect see *San Francisco vs. S. V. W. W.*, 48 Cal., at 529.

The Charter, Article II, Chapter II, deals with the powers of the Board of Supervisors, and in Section 6 thereof provides for the method of granting franchises by the Board, and it

is therein specifically provided that franchises might be granted to conduct and operate a street railway upon or over or under the streets of the City and County "*not reserved for boulevards or carriage driveways.*"

And so, the Supervisors by the above prohibition, are forbidden to grant any such franchise as is here applied for. We might go on to quote other sections of the Charter showing how particular the Charter framers were to protect the property reserved for parks or boulevards against their being used at all for commercial purposes.

You are therefore advised in accordance with the above:—

1st: That the Great Highway has been dedicated by the Board of Supervisors and the Legislature of this State as a boulevard and that because of this dedication, and the general law governing such a dedication, the permit herein applied for cannot be granted either by the Supervisors or the Park Commissioners.

2nd: That the Charter specifically prohibits the Park Commissioners and the Supervisors from granting the permit here applied for.

Respectfully,

PERCY V. LONG,
City Attorney.

Committee of Streets, Sewers and Parks,
Board of Supervisors.

The Board of Supervisors May Rescind its Action Refusing to Ratify a Lease of a School Lot.

February 2d, 1911.

Gentlemen: I am in receipt of your communication as follows:

"I am directed by the Board of Education to respectfully request from your office, your opinion in the following matter:

"In February, 1909, after having conformed with Charter provision in the matter of advertising, the School Board awarded a lease on school lot at First and Tehama Streets, to Mr. Jno. E. Buckley, of the Dundon Iron Works. The terms of the lease were transmitted to the Honorable Board of Supervisors, which body did not find it possible to ratify the award, considering that the bid was small.

"The School Board desires to know if it may at this time consider the resolution passed in February, 1909, awarding the lease, still in force and effect. Would it be proper for the Board to request the present Board of Supervisors to ratify such action?"

Opinion.

There is no provision in the Charter which would prevent your Honorable Board from resubmitting the ratification of the lease to Mr. Buckley of the property mentioned to the Board of Supervisors under the resolution passed in February, 1909, which if the same has not been rescinded is still in force and effect.

The Board of Supervisors may rescind its action in refusing to ratify said lease and enter into the same at this time, and it would be entirely proper for you to request the Board of Supervisors to take such action.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

As to Disposition of Lands Which Have Been Abandoned as Public Streets or Highways.

February 8, 1911.

Gentlemen: I am in receipt of your communication of the 3rd inst. as follows:

"I am directed by Supervisor John P. McLaughlin, Chairman of the Committee on Streets, Sewers and Parks, to refer

to you the communication from the Sterling Realty Company, with copy of an Act to provide for the disposition of lands abandoned as public streets or highways, with the request that you advise the Committee on Streets, Sewers and Parks upon the following questions:

1. Has the Board of Supervisors the power under the Charter, to authorize the execution of deeds from the City to owners of property abutting on the streets so proposed to be abandoned?

2. If such power is not granted in the Charter, will the Act proposed to be passed by the present State Legislature, be sufficient to confer that power?

3. Would deeds executed pursuant thereto, convey all title that the City might have in such streets?"

Opinion.

There are two methods provided in the Charter, or rather there are two bodies vested with power and authority to close streets in this City and County. Under Section 27, Chapter II, Article VI, the Board of Public Works is authorized to close any street which is less than forty feet in width, upon the filing of a petition therefor, signed by the requisite number of property owners, as therein specified. The section provides that, upon the closing of said street, the land theretofore included within the roadway and sidewalks of said street shall thereafter be the property of the City and County.

Section 1, Chapter III, Article XI, empowers the Board of Supervisors to close up, in whole or in part, any street within the City and County irrespective of its width, but this Chapter is silent on the subject as to the ownership of the land theretofore included within the roadway and sidewalks of said closed street.

In an opinion rendered by me to the Board of Supervisors on May 27, 1909, I held, in discussing the power of the Board to close Langton Street, under the provisions of Chapter III, that there was no repugnancy between this section and Section 27, of Chapter II. I also advised that if both sections

could not be construed together, then, that Section 27 was repealed by the adoption of the Charter amendment to Section 1, of Chapter III, to the extent of the repugnancy, and that the Board of Supervisors had jurisdiction to proceed under Section 1, Chapter III, Article VI of the Charter.

The power and the method of closing streets being thus determined, there remains the question first propounded in your communication.

In answer to the first question, I will advise you that you have no such power, either under the Charter nor any general law of this State.

I will take notice of the fact that the streets in the Sunset District are over forty feet in width, the same having been established by the report of the Commissioners on Outside Lands.

There is no provision in the Charter for the disposal of land included in a street after the same is closed. In the absence of any such provision, the Legislature has the power to provide, by the enactment of a law, for the disposition of such land by authorizing the governing body of any municipality to make and execute deeds of the same to the owners of the land abutting on said closed street. This has been held to be the law of this State by the Supreme Court in the case of *Fleming vs. Hance*, 153 Cal., page 163, where it held that in the absence of a Charter provision establishing a police court, that the Legislature retained the power originally vested in it with reference to inferior courts of this State, notwithstanding that Section 8½ of Article XI of the Constitution authorized the creation of police courts by freeholders charter.

You are also advised that the proposed Act as drafted would be sufficient to confer the necessary power on the Board of Supervisors, but I thought it advisable to amend the same in some particulars, and I suggest that the Act so amended, be submitted to the Legislature, if the Board, in its discretion and judgment, so decide.

As I said above, the Legislature has the power to confer authority on your Honorable Board to convey said lands in

the manner provided in the proposed Act, and it necessarily follows that deeds, executed pursuant to said Act, if enacted into a law, would convey all the title that the City and County might have in such lands.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Persons Selling Ice Cream and Cakes to Be Partaken of
Upon the Premises, Must Pay the Tax Prescribed in
Ordinance No. 1677.**

February 17, 1911.

Dear Sir: I am in receipt of yours of the 16th inst. in which you inquire as follows:

“Please inform me if a party or parties selling ice cream and cake or cakes is liable to pay a license under Ordinance No. 1677.”

Opinion.

As I understand it you wish advice concerning establishments such as refreshment parlors that invite the public to make use of their locations as places of refreshment, and while so remaining on the premises, partake of ice cream and cake. I refer you to my opinion of November 5, 1909, upon the same subject of the scope of Ordinance No. 1677; and, in accordance with the suggestions set forth therein I advise any establishment coming within the term of “restaurants” or “places of refreshment” as defined in my former opinion, and selling ice cream and cakes to be partaken of upon the premises, is liable for the payment of the tax as provided in Ordinance No. 1677 of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Power of Board of Supervisors to Secure from the Spring Valley Water Company an Adequate Supply of Water for the Use of Inhabitants of City and to Compel the Company to Extend Its Mains.

February 27th, 1911.

Gentlemen: I am in receipt of a communication from the Clerk of your Board reading as follows:

“Pursuant to motion of Supervisor McLaughlin, carried at meeting of Water Rates Committee, sitting in committee of the whole Friday evening, February 17, 1911, you are hereby requested to advise the Board of Supervisors as to its power, under the law, to secure from the Spring Valley Water Company a sufficient supply of water for the use of the inhabitants of this City and County, and also as to the Board of Supervisors’ power to require necessary extensions of pipe service for delivering same.”

Opinion.

It is well settled by the law of this State that “whenever water is appropriated for distribution and sale the public has a right to use it, that is, each member of the community by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner.” (McCrary vs. Beaudry, 67 Cal., 120; Fallows vs. City of Los Angeles, 151 Cal., 58; Leavitt vs. Lassen Irr. Co., 157 Cal., 89-90.)

On the other hand, it has been held that the above rule “is not to be understood as denying the right of such company or person in possession of a limited amount of water to devote that amount to the irrigation of a given area of land”; and that a water company may fix the limits of the territory to which it will furnish such water as it may control. (Leavitt vs. Lassen Irr. Co., 157 Cal., 92.)

The ruling last above referred to has been made by the Supreme Court of this State in connection with the water

in possession of an irrigation company used for the irrigation of country lands.

After exhaustive search I am unable to find any case in which facts similar to those referred to in your communication have been passed upon by any court. The exact question in dispute, as I understand it, is whether or not your Board can compel the water company now supplying water to San Francisco and its inhabitants to extend its mains in portions of the City in which no mains are now laid.

In my opinion the public obligation assumed by the Spring Valley Water Company is such as to compel it to supply the needs of the inhabitants of San Francisco. In the absence of authority it cannot be said with definiteness how far the courts will go in compelling the water company to make capital expenditures in the performance of this duty. I advise, however, that an action be brought to test this question and shall be pleased to comply with any request of your Board in that regard.

On the 4th day of October, 1909, a proceeding in mandamus was brought by this office against the Spring Valley Water Company to compel that company to erect a tank on Parker Avenue, in accordance with plans theretofore made by the Company, in order to furnish sufficient water for the inhabitants of that portion of the City dependent upon such supply. Shortly after such action was brought the supply in that particular locality was greatly improved by connection of other mains with those which had theretofore served the community. The complaint of the consumers was, therefore, obviated and I have been advised that the locality, which was previously suffering from lack of sufficient water, is now adequately supplied. The action above referred to has not been pressed as the cause of complaint has been removed.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Park Commissioners May Open a Road in Balboa Park,
Reserving Their Right to Supervise the Same, and
Retaining It as Part of Balboa Park.**

February 28th, 1911.

Gentlemen: I am in receipt of your communication of the 10th inst., reading as follows:

"On January 13, 1911, this Board, acting upon the petition of property owners and others in the Sunnyside District, recommended to the Park Commissioners that a strip of land on the border of Balboa Park be deeded for street purposes, to give the residents of the Sunnyside District easy access to Ocean Avenue. The Park Commissioners replied in substance that under the law they had no right to divert land belonging to the park for any purpose other than park purposes.

This Board requests that it be advised as to the method whereby this strip of land could be deeded for street purposes."

Opinion.

On December 20, 1910, I rendered an opinion to the Board of Park Commissioners on their power and authority to convey any of the lands embraced in the public parks of this City, or set aside any of the said lands for the purpose intended, or any street, a copy of which opinion is herewith enclosed. The Board of Park Commissioners, having no authority to deed land embraced in any of the parks, the only way that the result desired by the property owners and others in the Sunnyside District can be accomplished would be for the Park Commissioners to open a road along the line indicated in the letter dated January 13, 1911, from the Board of Public Works to the Park Commissioners of this City and County. The Park Commissioners have ample power and authority under the Charter to do that, and in that way people residing in the Sunnyside District would be provided with easy access to Ocean Avenue, the Park Com-

missioners reserving their right to supervision over said road and the same remaining a portion of Balboa Park.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Money Due the State and Deposited With the Clerk of the Court for the State Is Not Subject to Assessment for Taxes.

March 1st, 1911.

Gentlemen: I am in receipt of your communication enclosing the claim of the Pullman Company for the return to that company of \$389.40 alleged to have been illegally collected as taxes. It appears that in the action of the People of the State of California vs. the Pullman Company, No. 1798, there was deposited with the Clerk of the Superior Court of the City and County of San Francisco the sum of \$19,470. The action was brought to recover from the Pullman Company taxes alleged to be due to the State of California. The amount sought to be recovered in the action was \$36,599.33. The Pullman Company claimed that there was only due to the State of California the sum of \$19,470. This sum, which was admittedly due the State, and which was deposited with the Clerk of the Court, as above stated, was by the Clerk deposited with the County Treasurer. The action, therefore, no longer concerned this sum, for it made no difference how the action would be finally decided as to the remaining amount in dispute, and this sum of \$19,470 would in all events go to the State of California.

While the action was pending the Assessor of the City and County of San Francisco assessed this sum of \$19,470 under the provisions of Section 3647 of the Political Code. That section provides:

“Money and property in litigation in possession of a county treasurer, of a court, county clerk or receiver, must be assessed to such treasurer, clerk or receiver, and the taxes be paid thereon under the direction of the court.”

In assessing this sum under the provisions of Section 3647 the Assessor was in error as to the character of the deposit. The same was not property in litigation for the reason, as hereinabove stated, but was admittedly property which belonged to the State, and which under no circumstances would go back to the company.

It appears, however, that the litigation was settled by the Pullman Company agreeing to pay to the State of California the full amount of taxes that was claimed by the State. In order, however, to make the settlement, counsel for the State of California and counsel for the company agreed that the Pullman Company would pay the full amount of taxes into the State Treasury in one payment. In pursuance of this agreement and understanding the company paid to the Treasurer of the State the total amount of taxes, which included this sum of \$19,470 theretofore paid into Court. Having paid this sum in this way and under agreement of counsel, the company was of course, entitled to receive back the said sum of \$19,470 paid into court and subsequently the company did receive back this sum. If this arrangement had not been made the said sum of \$19,470 would have been paid directly by the County Treasurer to the State Treasurer. The fact, however, that the payment of taxes was made in this way under agreement of counsel for the State and counsel for the company does not alter the character of the deposit of \$19,470 with the Clerk of the Court. It was to all intents and purposes the property of the State. The Attorney General of the State, special counsel for the State in the litigation and the Assessor of the City and County, have written to me stating that the assessment should not have been made. The Assessor states that if he had been fully aware of all the facts of the settlement the assessment would not have been made.

I concur in their opinion and I therefore advise you that under the circumstances stated the assessment on this sum of \$19,470 was improperly made, and that, therefore, the amount of the taxes paid thereon, to-wit, the sum of \$384.40, should in justice be returned to the Pullman Company.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**The Amount of Assessment for Street Improvements Is
Based Upon the Last Assessment Roll.**

March 11, 1911.

Gentlemen: I am in receipt of your communication as follows:

“The Board of Public Works, by Resolution No. 9488 (Second Series), passed February 1, 1911, desires to be advised as to the proper interpretation of that portion of Section 8, Chapter 2, Article 6, of the Charter, reading as follows:

“ ‘No assessment shall be levied upon any property which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment book of the City and County’;

“and particularly defining the words ‘last preceding assessment book.’ ”

Opinion.

The method for computing the assessment for street improvements under the charter provision quoted above is as follows:

The assessment for street work performed during any year before the assessment roll or book is made up for that year must be computed on the assessed value of the property liable to be assessed, as appears on the assessment roll or book for the previous year.

It was never intended by the Charter framers, in my opinion, that the assessed value of the property on the roll for the year 1909 should be taken as the basis for assessments levied in the year 1911, for street work purposes. The phrase must be read as meaning the last assessment roll, and that being so, we shall have to consider that the assessment roll for the year 1910, which is the last, must be used in arriving at the percentage for which the property is to be assessed.

It might appear, at first glance, that because the assessment is levied during the fiscal year, that the assessment roll for the previous fiscal year should be used. For instance, if an assessment is to be levied during the fiscal year 1910-11, it might be argued that the assessment roll for the fiscal year 1909-10 should be taken as the basis upon which to compute the assessment. That view, however, cannot be sustained. The language of the section itself is opposed to that idea. Therein is used these words, "during the year next preceding." No mention is made of fiscal year, and it must be presumed that a calendar year is meant.

Therefore, we are compelled to eliminate any suggestion that fiscal year plays any part in the solution of this question. There has been no judicial definition of the phrase in this State. The decision in other jurisdictions coming most closely to the point is that contained in the case of *State vs. Pierce Co. Supervisors*, 37 N. W., 233; 71 Wis., 32, as follows:

"Laws 1885, Chapter 187, paragraph 1, provides for county aid to towns in building bridges whose cost exceeds one-fourth of one per cent of all taxable property of the town 'according to the last equalized valuation.' Held, that the phrase 'last equalized valuation' meant last valuation

before the annual town meeting in April, 1886, and hence referred to the valuation of 1885."

You are therefore advised that the last assessment roll or book preceding the levy of the assessment for street work must be used as the basis for computing the amount of said assessment.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

A Contractor to Do Sewer Work for the City Went Into Bankruptcy. Sureties on the Bond Can Complete the Work and Payments May Be Made to Such Sureties. Their Demands Are Entitled to Approval. Sufficient Funds Should Be Held Back to Meet Demands of Material Men and Labor.

April 17, 1911.

Gentlemen: I am in receipt of your communication of the 28th ult., in which you ask to be advised whether payments can be made to the Pacific Coast Casualty Company, which Company was surety on the bond of the Metropolis Construction Company under its contract with the City and County for the construction of the so-called Lower Sunset Sewer, and also you wish to be advised as to the authority of the Board of Public Works to permit the prosecution of contracts for public improvements by parties other than the contractor and to approve for payment the demands of such parties.

The facts as they appear to me from your communication and other sources are as follows:

The Metropolis Construction Company entered into a contract with the City and County for the performance of the work above mentioned on or about the 26th day of March, 1910, known as "Contract No. 36".

Thereafter the Metropolis Construction Company was declared a bankrupt in the District Court and an order was made in the bankruptcy proceedings by Judge Armand B. Kreft, Referee in Bankruptcy, on January 27, 1911, authorizing the Pacific Coast Casualty Company to continue and complete the work under said contract and to take possession of and use the plant and equipment installed by said Metropolis Construction Company for the purpose of carrying on said work; also to collect and receive from the City and County of San Francisco all payments which have accrued or which might thereafter accrue under or on account of said contract, and to dispose of the money so received in accordance with the terms of said order.

Thereafter Resolution No. 10,068 (Second Series) was adopted by the Board of Public Works on March 8, 1911, containing a recital of the facts of the inability of the Metropolis Construction Company to prosecute the work under the said contract, and the election of the Pacific Coast Casualty Company to perform said work, and providing that for all work performed in connection with said contract subsequent to the taking charge of and prosecution by said surety, as such, any and all payments to be made in accordance with the terms and conditions of said contract be made to the said Pacific Coast Casualty Company, as the surety on the bond of the said Metropolis Construction Company, as said contractor.

Under date of February 4, 1911, John Daniel, Trustee in Bankruptcy of the Estate of the Metropolis Construction Company, filed notices with the Board of Supervisors and the Board of Public Works, protesting against the payment of any money to anybody other than himself as trustee for said bankrupt, claiming all moneys due on said contract as an asset of the estate of said bankrupt.

On the 29th day of March, 1911, I received a second communication from your Honorable Board informing me that you had received a letter from John Daniel, Trustee, as aforesaid, of which the following is a copy, as contained in your communication:

"I have no objections at all to your paying over to the Pacific Coast Casualty Company all moneys which they have earned on the sewer in the Sunset District, which was originally let by the City and County of San Francisco to Metropolis Construction Company."

This letter from the Trustee clears away all complications as between the Trustees and the City and County and would place it in a safe position to pay over said moneys to the Pacific Coast Casualty Company providing that there were no other questions involved herein.

I note also that there have been filed with the Board of Supervisors and with the Auditor by persons or firms who furnished materials, other notices against the Metropolis Construction Company.

"Under Section 1184 of the Code of Civil Procedure, the mechanic or material man may give the owner of the building upon which he has performed labor or for which he has furnished material, written notice of his claim and, therefore, it becomes the duty of such owner to retain funds to answer such claim. Upon receipt of the notice the owner becomes liable as on garnishment or assignment. * * * The equitable garnishment provided for by Section 1184 of the Code of Civil Procedure is a cumulative remedy in ordinary cases, but in this instance it is the only remedy provided by the lien law, because the pursuit of the remedy by foreclosure would involve the taking of buildings which, on the grounds of public policy and public necessity are exempt from execution and forced sale, and this remedy is one which does not contravene any principle of public policy. It merely operates as an assignment pro tanto of the money due by the owner to the contractor, and in no way affects the public building.

The fund is in the treasury and the statute justly provides that instead of paying it to the contractor for the work which the laborer has actually performed, the owner shall pay it to the latter."

Bates vs. Santa Barbara Co., 90 Cal., 546.

"It seems reasonable to say that no assignment made by the contractor of the amount to become afterward due to him in the course of performance of the contract could, before the arrival of the time of payment, defeat the right of the materialman to give the notice in question and obtain the benefit thereof; if an assignment so made could have that effect then the provisions of the statute in this regard could in most cases, be evaded. The Section requires the owner, on receipt of the notice, to withhold sufficient money 'due or that may become due' to answer the claim; and doubtless the notice may be effectually given so long as the money is owed to the contractor himself, although the time when it should have been paid is passed."

First Nat. Bank vs. Perris, 1 Dist. 107 Cal. 61.

The Act of March 27th, 1897, relating to the service of notice of unpaid claims against the contractor on work performed for any city and county, provides, in Section 2 thereof, that any materialman furnishing materials used in the performance of the work, or any person who performed work or labor on the same whose claim has not been paid, shall, within thirty days from the time such work is completed, file with the Board of Supervisors a verified statement that the same has not been paid. At any time within ninety days after the filing of such claim, the persons filing the same may commence an action against the sureties on the bond, specified and required by Section 1 of the Act.

This Act, as was held in the case of *French v. Powell*, 135 Cal., at page 640, provides a remedy entirely disconnected from and additional to the remedy by him against the building, provided for by Section 1184 of the Code of Civil Procedure, which, as has been shown above, requires the owner to withhold at his peril, sufficient money to meet the claim when notice is served upon him.

In view of the provisions of the law and the cases cited, care should be taken to the end that the City and County shall not be liable for the payment of any claims against the Metropolis Construction Company for labor performed

or materials furnished during the time that Company was doing the work, and, that sufficient money be retained by the City and County to cover any and all unpaid claims due to persons who have filed notices in accordance with Section 1184 of the Code of Civil Procedure.

The question whether or not the sureties on a contractor's bond in a contract for public work can, in the event that the contractor fails to complete the work or abandons the contract, have the right to assume and perform the contract according to its terms and conditions, has not, so far as I have been able to ascertain, been passed upon by the Courts of this State. In a New York case, *Jones vs. City of New York*, 70 N. Y. Supp. 46, it was inferentially held that sureties had that right, and I believe that if the question is ever presented to our courts, it would be answered in the affirmative.

It necessarily follows that the sureties, possessing the right to perform the contract, they would have the right also to collect and receive all money due under the contract for the services performed by them in its execution and in order to collect and receive said money, they are entitled to the approval of their demands by the Board of Public Works.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

LeRoy Place—Title to Southerly 137' 6" is in the City.

**There is an Offer to Dedicate the Northerly 23' 6"—By
Accepting this Offer LeRoy Place Becomes an open
Public Street.**

April 17th, 1911.

Gentlemen: I am in receipt of your communication of March 13th, which reads as follows:

"The Board of Public Works in its Resolution No. 9572, Second Series, passed February 8, 1911, includes the im-

provements of LeRoy Place from Sacramento Street northerly. A protest has been filed against the doing of this work, the protestants claiming that LeRoy Place is not a public street.

This Board desires to be advised as to whether or not LeRoy Place from Sacramento Street to its northerly termination is an open public street."

I have caused a search of the title to be made to LeRoy Place, as described above and I find from the report that I received that the southerly 137 feet 6 inches in the City and County of San Francisco, is a public street, under deed from Henry Carthwaite and Charlotte T. Carthwaite, his wife, to the City and County of San Francisco, dated May 2, 1863, recorded November 30, 1863, (221 D. 297). The title to the northerly 23 feet 6 inches is in the heirs of William Hollis, deceased, subject to the rights of way in abutting owners as per conveyance to them by William Hollis, under deed recorded on November 30, 1877, in which LeRoy Place is described as a public street. As to the map phase of the northerly 23 feet 6 inches, the same is not shown on the Tilton Map of 1899 or on the Humphrey Map of 1870. The same however, is not assessed for taxes.

As to the northerly 23 feet 6 inches, the title of which is shown in the report to be in the heirs of William Hollis, deceased, the City may at any time accept the offer of dedication made in the deed recorded on November 30, 1877, and such acceptance will remove all doubt as to the status of said portion of LeRoy Place and establish it as an open public street.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Certain Demands Against the City for Flooring are Legal Demands and Should be Paid.

April 20th, 1911.

Gentlemen: I am in receipt of your communication of April 19th, 1911, which reads as follows:

“Prior to the passage by the Legislature of an Act to provide for temporary floors in buildings more than three stories high in course of construction, and for the protection of the life and limb of workmen employed in such buildings from falling through joists or girders and from falling bricks, rivets, etc., two municipal buildings were in course of construction in pursuance of contracts awarded by the Board of Public Works, to **more than one contractor** in each case, namely the Commercial School building and the Hall of Justice building.

On the 17th day of November, 1909, by resolution passed by the Board (No. 899, Second Series), the Architect of the Board was authorized to order the flooring for the Hall of Justice building, in accordance with the requirements of the aforesaid State law, at the price submitted by Dyer Brothers' Golden West Iron Works, Inc., namely, \$1,000.00, a copy of which resolution is herewith transmitted. On November 24th, 1909, the Board by its resolution (No. 1051, Second Series) accepted the offer made by Dyer Brothers' Golden West Iron Works, Inc., to place floor planking at the Commercial School building as required by said law, for \$1,000.00 a copy of which said resolution is also herewith transmitted.

The aforementioned work was actually performed as appears from the affidavit, herewith transmitted, of G. A. Mil-
lar, who during the year 1909 and until February 17, 1910, was Chief of Inspectors of Building Construction under the Board of Public Works.

Two demands on the Treasury of the City and County, of said Dyer Brothers' Golden West Iron Works, each in the sum of \$1,000.00 for compensation for said work referred

to, are before this Board for its approval and recommendation to the Supervisors for payment. These demands are transmitted to you, together with documentary data, for investigation into the legality of the same, with the request that you advise this Board in respect thereto."

I have examined the enclosures and it is my opinion that the two demands by Dyer Brothers are proper demands against the City and County of San Francisco. Inasmuch as the State law required the owner of a building who had awarded a contract for the construction of a building to more than one contractor to provide the flooring required by the act of the Legislature referred to in your communication a legal duty rested upon the City and County to fulfil that law. Having properly entered into a contract with Dyer Brothers to provide the necessary flooring, I know of no legal reason why the City should not fulfil its part of the contract and pay the contract price to the contractor.

I therefore advise the payment of these demands.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

City Treasurer Not Permitted to Deposit in Bank, Any Moneys of the City, Where the Total Amount of Public Money Deposited with Such Bank is in Excess of 50 Per Cent of the paid up Capital Stock of such Bank.

April 20th, 1911.

Hon. John E. McDougald, City Treasurer,

Dear Sir: I am in receipt of your letter of April 18th, 1911, asking that you be advised if it is your duty to inquire of banks applying for a deposit of public funds, if they have on deposit any public moneys of the State of California or of any county or municipality in this State, which deposits,

together with the amount of deposit applied for from you, shall exceed fifty per cent of the capital stock of said bank.

Section 16 $\frac{1}{2}$ of Article XI of the Constitution of the State of California, as adopted November 6th, 1906, is as follows:

“All moneys belonging to the State or to any county or municipality within this State may be deposited in any national bank or banks within this State * * provided that no deposit shall at any one time exceed 50% of the paid-up capital stock of such depository bank or banks, etc.”

The Charter of the City and County of San Francisco, Section 2 of Chapter III of Article IV, as approved by the Legislature on November 22nd, 1907, provides, among other things, that:

“The total amount of **public moneys** on deposit in any bank shall not at any time exceed 50% of the paid-up capital stock of such depository bank or banks, etc.”

Reading the constitutional provision alone it might be inferred that each depositing county or municipality could deposit its moneys to the extent of 50% of the capital stock of the applicant bank and thus one bank might receive its deposits of public moneys greatly in excess of its capital stock.

The strongest indication that such was not the intention of the people of the State in adopting the above constitutional amendment is to be found in the requirement that “no deposit shall at any one time exceed 50% of the paid-up capital stock” of the applicant bank. This requirement shows beyond any doubt that behind the bonds negotiated as security for deposits the people desire the extra protection, in the event of a crisis, of the stockholders’ liability.

Were banks permitted to receive many times their capital stock in deposits it is obvious that the extra security afforded by a stockholders’ liability would be greatly minimized and possibly in extreme cases, almost entirely eradicated.

Passing to the consideration of the charter amendment above cited, we find the limitation that the total amount of

"Public Moneys" on deposit in any bank shall not exceed 50% of the paid-up capital stock of said bank. The use of the phrase "public moneys" is certainly general enough to include the moneys of the state and of every county and municipality within the state, or in other words, it includes all moneys belonging to the public available for deposit. Therefore, if all the moneys belonging to the public on deposit in any one bank cannot exceed 50% of the paid-up capital stock of such bank then there is a clear inhibition against depositing any more moneys of the City and County of San Francisco, which, taken with all other moneys on deposit from public treasuries, will exceed the 50% above mentioned.

It is clear from what is above stated that you are not permitted, under the law, to deposit any moneys under your control as Treasurer of the City and County of San Francisco, which taken with other moneys on deposit from similar sources with the applicant will exceed 50% of the paid-up capital stock of such bank.

Respectfully,

PERCY V. LONG,
City Attorney.

It is the Treasurer's Duty, Upon the Filing of a Proper Claim Under Section 1183 C. C., to Withhold Sufficient Money Due a Contractor to Meet Such Claim.

April 24th, 1911.

Sir: I am in receipt of your communication of April 21st, 1911, which reads as follows:

"The large number of claims filed in this office by Sub-Contractors, Materialmen and laborers against contractors for public buildings, Sewers, etc., is becoming so burdensome that I have declined, in conjunction with the Auditor, to hold any more money under Section No. 1184 C. C. P. I am

of the opinion that the entire last payment due the contractors should be withheld until these minor claims are all paid. This office should not be turned into a collection agency on the one hand or made the dumping grounds for a lot of petty law suits on the other. I desire explicit advice in this matter and would very respectfully ask that when giving your opinion you kindly remember that the amounts held cannot be entered in any of the books of record of this office and the custom of carrying a number of small deposits, or any kind of deposits either small or large, without proper entries is far from business like and should not be asked in a Public Office such as this is. I sincerely trust that some better method can be adopted without doing any injustice to any of the parties in interest."

Opinion.

Section 1184 of the Civil Code provides that any person entitled to a lien under section 1183 (except the contractor) may at any time give notice to the owner to withhold from the payments due the contractor sufficient money to answer such claim, with reasonable costs.

This section applies to public corporations as well as to a private owner and upon the filing of the notice with the officers of the City it becomes their duty to withhold the amount claimed from the money due the contractor. A failure to comply with the provisions of the section creates a liability against the City and in favor of the claimant.

In *Bates vs. Santa Barbara*, 90 Cal., 543, the Supreme Court of this State held that the provisions of this section were in lieu and in addition to all laws providing for the enforcement of mechanics liens and that filing of the notices amounts to an equitable attachment whereby the owner is required to withhold so much of the money due to the contractor as is stated in the notice, and if sufficient money is not due at the time of the filing of the notice, then such amount must be withheld from the moneys thereafter becoming due, and that a failure to comply with the provisions of

the section makes the owner personally liable to the claimant. These views were supported in the later case of Newport Wharf and Lumber Company vs. Drew, 125 Cal., 585. Of course the section relates only to claims arising from work and labor done or materials furnished in the performance of the particular contract mentioned in the notice.

The section does not authorize the owner to withhold all of the last payment and in making preliminary payments after notices have been filed you render yourself liable to the claimants if the last payment does not meet all of the claims which have been filed at the time the last payment becomes due. In withholding more than the amount claimed (with reasonable costs) you render yourself liable to the contractor in the event that other claims are filed subsequent to the date upon which payment becomes due and prior to the time that you make the payment.

It is therefore your duty to recognize all claims when filed and to withhold sufficient sums to satisfy such claims together with reasonable costs and to pay the balance over to the contractor. If at the time notices of the claim are filed the payment next due is not sufficient to satisfy said claims then it becomes your duty to withhold sufficient amounts from the subsequent payments to satisfy said claims.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

**Procedure to be Followed when a Contractor with the Board
of Works Refuses to Fulfill his Contract.**

April 28th, 1911.

Gentlemen: I am in receipt of your communication of April 19th in relation to the delinquency of Oscar S. Levy in the prosecution of a contract made and entered into by said Levy and the Board of Public Works on the 20th day of

August, 1910, for hauling and laying cast iron high pressure mains, conduits and appurtenances in the district described in the contract.

It appears from Resolution No. 10,793 (Second Series) of the Board of Public Works that Levy has for a considerable period of time refused to fulfill his contract.

The procedure for the Board of Supervisors to follow is for the Board to pass a resolution reciting the delinquency of Levy and authorize the Board of Public Works to enter into a new contract for the unfinished portion of the work undertaken by Levy in his contract. I would advise the notification to the surety company, if it has not already been done, of the delinquency of Levy and would serve upon the surety company and Levy copies of the resolution providing for the reletting of the contract. Upon a new contract being entered into by the Board of Public Works recovery can be had by the City from the surety company for the difference of the contract price between the new contract and the Levy contract.

Under the Charter no payments can now be made to Levy, if any are due, for the work already done by him. The Board of Public Works in entering into a new contract should advertise for bids and award the contract to the lowest bidder, following the same procedure as required in the letting of an original contract.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

When an Indemnity Company Fails and is in the Hands of a Receiver, a new Bond Imposing the Same Liabilities as the Old Bond Must be Given.

April 29th, 1911.

Gentlemen: I am in receipt of a request for an opinion from you reading as follows, to-wit:

"My attention has been called by the officers of the Home Telephone Company to the fact that the Aetna Indemnity Company has gone into the hands of a receiver, and that they have filed with the Board for the faithful carrying out of the terms and conditions of their franchise, a bond in the sum of \$250.00, with the Aetna Indemnity Company as surety upon that bond.

I am enclosing you a copy of the bond, and request that you advise us the way to proceed immediately so that we can protect the interests of the City in this matter.

Trusting to receive an early reply, I remain, etc."

The bond referred to in said opinion is in words and figures as follows, to-wit:

"KNOW ALL MEN BY THESE PRESENTS: That we, the Home Telephone Company of San Francisco, a corporation organized and existing under the laws of the State of California, as principal, and the Aetna Indemnity Company of Hartford, Connecticut, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact business within the State of California, as surety, are held and firmly bound unto the City and County of San Francisco, a municipal corporation, jointly, in the sum of Two Hundred and Fifty Thousand (\$250,000.00) dollars, lawful money of the United States of America, to be paid to the said City and County of San Francisco, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors, and assigns, jointly and firmly by these presents;

Sealed with our seals and dated this twenty-fifth day of April, A. D., 1906.

The condition of the above obligation is such that

WHEREAS, on the 12th day of June, 1905, the HOME TELEPHONE COMPANY filed with the Board of Supervisors of the City and County of San Francisco, an application in writing for a franchise to construct, maintain and

operate a Telephone system in the City and County of San Francisco, and to construct, maintain and operate poles, wires, cables, underground conduits and other appliances, through, along, under and in the public streets, alleys and highways of said City and County of San Francisco for the purpose of transmitting sound, signals and conversations by means of electricity, or otherwise; and

WHEREAS, thereafter, in accordance with law, such action was taken by said Board of Supervisors upon said application of said Home Telephone Company that thereafter, to-wit: on the twenty-third day of April, 1906, after due notice given as provided by law, said franchise was duly struck off, sold and awarded by said Board of Supervisors to said Home Telephone Company of San Francisco as the highest bidder therefor; and

WHEREAS, said Home Telephone Company of San Francisco heretofore has deposited with the said Board of Supervisors, in the manner and within the time provided by law, the full amount of its bid for said franchise.

WHEREAS, the Board of Supervisors of the City and County of San Francisco proposes to grant to said Home Telephone Company of San Francisco, said franchise in the form and subject to, the terms and conditions prescribed by and set forth, in the ordinance providing for the sale of said franchise passed by the Board of Supervisors of the City and County of San Francisco on the 5th day of March, 1906, and approved by the Mayor of the City and County of San Francisco on the 16th day of March, 1906;

Now, therefore, if the said Home Telephone Company of San Francisco, its successors, or assigns, shall well and truly observe, fulfill and perform each and every term and condition of said franchise, then this obligation shall be void; otherwise this obligation shall remain in full force and effect, and in case of any breach of the condition of this obligation the whole amount of the penal sum herein named shall be

taken and deemed to be liquidated damages, and shall be recoverable from the principal and surety upon this bond.

HOME TELEPHONE COMPANY OF SAN FRANCISCO,

By (Signed) Mark Gerstle, President.
and (Signed) Thos. W. Phillips, Secretary.

THE AETNA INDEMNITY CO. OF HARTFORD, CONN.

By (Signed) Paul M. Hippert,
Its Attorney in Fact.
and (Signed) Shirley W.”
Assistant Secretary.

In reply to your request for an opinion would state that I find that the bond in this case was given under the provision of a franchise granted by the City and County of San Francisco to the Home Telephone Company, and it is in accordance with the terms of said franchise.

A new bond should be given, however, in which it should be stated that (1) the Aetna Indemnity Company having become unable to continue in business in the State of California, and having become insufficient as a surety, a new bond is given in lieu of and in place of and as a substitute for the bond referred to in your request for an opinion, and that the principal and sureties under said new bond shall be liable and incur all liabilities that may have arisen under the former bond, in addition to liabilities that may arise from the time of giving of the new bond, or words to a similar effect.

Yours very truly,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Concerning the Validity of a Proposed Ordinance Imposing
a License on the Business of Renting Safe Deposit Boxes.**

May 1st, 1911.

Gentlemen: I am in receipt of your request for an opinion as follows:

“The License Committee of the Board of Supervisors requests your opinion as to the validity of the proposed ordinance herewith enclosed, imposing a license on the business of renting safe deposit boxes, safes and vaults.

The amount of the license proposed will approximate \$5.00 per hundred.”

Opinion.

In reply will state that I believe that the proposed Ordinance referred to in your letter to be a legal Ordinance. I might suggest the substitution of the words “other articles” or “any other articles” for the words “articles of value” as, of course, the business you are taxing is the business of safe deposits which business consists of renting safe deposit safes and vaults which are for the storing of any article whether valuable or otherwise.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Upon the Death of a Member of the Fire Department, Who had for Two Years been in Receipt of a Pension for Injuries Received in the Line of His Duty, his Widow is Not Entitled to a Pension.—The Pension Ceases with His Death.

May 1st, 1911.

Gentlemen: I am in receipt of your communication in which you request advice on the following state of facts. M. F. Dougherty was appointed a member of the Fire De-

partment on February 3, 1898, and was granted a pension of \$50.00 per month August 10th, 1906; this pension, as I understand it, was granted under the Charter section which authorized the granting of pensions to a fireman who received injuries in the performance of his duties; he received said pension of \$50.00 per month, or one-half of his salary as a hoseman, up to the date of his death on December 30th, 1908, and was a pensioner at the time of his death. The Charter section regulating the salaries of the members of the Fire Department was amended November 5, 1907. The rank held by said Dougherty during his service in the department was that of hoseman. The above amendment increased the salary of a hoseman, after his having been retired, from \$100 to \$120 per month; that on or about July 1, 1909, the widow of said Dougherty was granted a pension of \$50.00 per month on the theory that her husband had been killed while in the performance of his duties, he having died as a result of injuries which occasioned his retirement from the department. A petition has been made to the Board by said Mrs. Dougherty that her pension be increased from \$50.00 to \$60.00 per month; that is, that she receive one-half of \$120 instead of one-half of \$100, the Charter section covering this matter reading that the widow of a member of the department killed while in the performance of his duties shall receive "one-half of the salary attached to the rank held by the decedent at the time of his death".

Opinion.

The District Court of Appeal in and for the First Appellate District of this State has rendered an opinion in the case of Mabel Edwards vs. The Police Pension Fund Commissioners of San Francisco (February 27th, 1911), in which we have for the first time, by an Appellate Court of this State, an interpretation of the Charter sections covering the rights to a pension of the widow of a police officer, upon the death of her husband, who had during his lifetime received a pension on account of injuries received; the widow claiming

the pension on the theory that her husband died as a result of those injuries, and that he was therefore "killed while in the performance of his duty."

The sections dealing with pensions in the Police Department are similar to those dealing with the same subject in the Fire Department, and the District Court of Appeal, in this case, the first to come before it, decided that the fact that the husband during his lifetime received a pension because of his injuries received in the performance of his duties, bars his widow from any right to claim a pension on the theory that he was killed in the performance of his duties, he having drawn this pension up to the time of his death and died as a result of those injuries. The Supreme Court denied a petition for rehearing in this case, and so, the rule of the case has been adopted by the Supreme Court. As I understand the fact of the Dougherty case, they are identical with those of the case decided by the District Court of Appeal with reference to the point above suggested, and therefore, upon the authority of this recent decision, I am compelled to advise you that Mrs. Dougherty is not entitled to any pension, inasmuch as her husband drew a pension during his lifetime on account of injuries received in the performance of his duties, which injuries finally resulted in his death.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Concerning the Power of the City to Proceed With the Construction of the Geary Street Railroad.

May 1st, 1911.

Sir: I have received your request for an opinion as to several questions with regard to the power of the City to proceed with the construction of a portion of the Geary

Street Railroad, which questions were suggested at the conference held at your office on April 4th, 1911. I have remodeled the statement of these questions to conform with the suggestions made at the conference, to read as follows:

Questions Involved.

FIRST. Can the City proceed with the expenditure of moneys derived from the sale of Geary Street Railroad bonds in the construction of said road notwithstanding the fact that the temporary injunction heretofore issued in the United States Circuit Court restrains the City from building the road on certain blocks on Point Lobos Avenue which are included in the route proposed?

SECOND. Can the City, in the construction of the Geary Street Railroad, deviate from the route described in the ordinance under which the bond election was held?

THIRD. Is the City authorized to remove the tracks now on Geary Street upon which the cars of the present railroad company are being operated, and, if so, what notice of such removal should be given to the present company and to whom will the tracks belong after they are removed?

Replying to the foregoing, in their order, I submit the following:

First. City May Construct Portion of Project.

The injunction granted by the Honorable Wm. C. Van Fleet, Judge of the United States Circuit Court, restrains the City from constructing a municipal road "over and along Point Lobos Avenue from Thirty-third Avenue to Forty-second Avenue, the point of intersection of Cliff Avenue with Point Lobos Avenue, a distance of nine blocks." At the same time Judge Van Fleet permitted the City to proceed with the rest of the project and particularly ordered that "in all other respects you and each of you, your officers, representatives, servants, agents and all persons acting under you or by your authority, are left free to proceed with the enterprise complained of, except as hereinabove restrained."

The foregoing is a specific finding on the part of the trial judge to the effect that the City may proceed with the enterprise in all other respects excepting as to the construction and operation of the road on that portion of Point Lobos Avenue mentioned in the order. It is a finding against the contention of complainant that by reason of the inability of the City to construct and operate its road over that portion of Point Lobos Avenue the City should be restrained from constructing any portion of the road or from selling any bonds or incurring any indebtedness in the furtherance of the project. It is a finding to the effect that the inability of the City at the present time to construct its road over that portion of Point Lobos Avenue does not invalidate the bonds authorized for that purpose and does not warrant the issuance of a restraining order to prevent further proceedings on behalf of the City. From this portion of the finding against the contentions of the United Railroads no appeal was taken and the time for appeal has now expired.

In the action entitled *PLATT vs. CITY AND COUNTY OF SAN FRANCISCO*, 110 Pac. 304, at page 312, the Supreme Court of this State, in passing upon the validity of these Geary Street bonds, held that it was no objection to the validity of the bonds that obstacles were in the way of the proposed project, but that the Court would assume that these obstacles had been or would be removed.

It may, therefore, be taken as settled, that the injunction of the United States Circuit Court does not affect the validity of the Geary Street bonds or prevent their sale or prevent the disposition of the proceeds upon any part of the project.

Assuming, for the sake of argument, that there may be merit in the contention that the inability of the City to construct the road in the manner described in the bond proceedings would prevent the expenditure of any of the moneys upon any part of the project, there is no way in which the question could be raised at this time. The City has already entered upon the construction of the road and has expended

over \$100,000 and entered into contracts for the expenditure of additional sums. Any taxpayer seeking to prevent the further expenditure of moneys for these purposes would be estopped by his laches. None but a taxpayer could show the necessary interest to entitle him to an injunction. A taxpayer's suit would necessarily be brought under the provisions of Section 526a of the Code of Civil Procedure. This section merely authorizes actions by taxpayers to prevent the illegal expenditure, waste of, or injury to the municipal funds. The expenditure of funds for the construction of this road, though it be but a part of the original project, could not be said to be a waste or illegal expenditure. It would merely be a question of policy, that is, if such an action were to be brought it would resolve itself into a question of the advisability of the City proceeding with the use of a portion of the bond proceedings in the construction of a portion of the road while an injunction was pending preventing the construction of the entire road. If this expenditure would be beneficial to the public and the municipality, the determination of that fact by the Supervisors is final and conclusive upon the courts. It is conceded that no action may be brought to restrain the acts of the municipal authorities except such as are authorized by statute, and the statutes do not authorize an action to determine questions of public policy.

Assuming, further, that such action upon the part of the City would be illegal and the expenditure of the proceeds thereof could be restrained, the people having authorized the issuance of the bonds, the Board of Supervisors may proceed with the issuance and sale thereof. No injunction will lie to prevent the offering for sale or issuance of municipal bonds for public utilities. (Sec 526a, Code of Civil Procedure, as amended Feb. 27th, 1911, in effect April 28th, 1911).

The situation, therefore, is this: The Supervisors may proceed with the sale and issuance of the bonds and deposit the proceeds thereof in the City Treasury. If they are prevented from expending the proceeds for the partial construc-

tion of the route they may, by ordinance, transfer all of such proceeds into the General Fund. After this has been done the Supervisors may, without further authorization or vote of the people, determine and declare that the public necessity demands the construction of such part of the road as they may deem advisable and pay for the same out of the General Fund. This view is supported by the decision of the Supreme Court of this State in *Irwin vs. Exton*, 125 Cal., 622

In accordance with the foregoing facts, you are therefore advised that there is nothing to prevent the authorities from proceeding with the construction of so much of the Geary Street road as is not restrained by the injunction above referred to, or from using the proceeds of the Geary Street Bonds for that purpose.

Second. City May Deviate from Original Project.

Inasmuch as this City is the first to attempt the construction and operation of a municipal railway under a bond issue, it is impossible to cite any authorities sustaining a deviation from the route fixed in the proceedings. As a matter of first impression, it may be said, however, that any deviation may be made by the authorities which does not affect the main purpose of the issue. At the election on December 30th, 1909, the first proposition submitted to the electors was as follows: "To incur a bonded indebtedness by the City and County of San Francisco to the amount of \$1,900,000 for the purpose of constructing a street railway over and along Geary Street, from Market Street to Point Lobos Avenue, Point Lobos Avenue from Geary Street to Cliff Avenue, Cliff Avenue from Point Lobos Avenue to a convenient terminal near the ocean, Tenth Avenue from Point Lobos Avenue to Golden Gate Park."

From the foregoing it appears that the City is authorized to construct a street railway on Geary Street from Market Street to Point Lobos Avenue and over Point Lobos Avenue to Tenth Avenue and thence to Golden Gate Park. There is

no restraining order of any kind preventing the immediate construction and operation of a street railway over this route.

Inasmuch as the purpose of the entire proceedings was to take the present Geary Street road from its private ownership and convert it into a municipal road, and inasmuch as the foregoing route closely follows the present Geary Street line, it may be assumed that the main purpose of the electors was to authorize the construction of a municipal line over Geary Street and Point Lobos Avenue to Golden Gate Park and that the line from Tenth Avenue over Point Lobos Avenue to Cliff Avenue and thence to the beach was considered as an extension of the main project.

If these views are correct there is nothing to prevent the Supervisors from making alterations in the route of the extension, which alterations would deviate a block or two on either side of the line proposed and reach the same end, to-wit, "a convenient terminal near the ocean."

Methods of Avoiding Obstacles.

In this connection, however, I desire to call your attention to the fact that there are several ways in which the so-called obstacles may be removed and thus permit the construction of the road without any deviation from the original plans.

First. Appeal from Injunction.

The order of the United States Circuit Court restraining the City from constructing and operating its road on the nine blocks of Point Lobos Avenue from Thirty-third Avenue to Forty-second Avenue, has been appealed to the United States Circuit Court of Appeals and such appeal will come on for hearing on the 18th day of May, 1911. If this order is reversed by the United States Circuit Court of Appeals the City will be free to carry out its original project.

Second. Right of Condemnation.

Senate Bill No. 1138, Chapter 358, of the Chaptered Laws, approved by the Governor April 5th, 1911, and in effect im-

mediately, authorizes a municipality to condemn any property devoted to a public use whenever "the use thereof for a public street or highway of a municipal corporation, or the use thereof by a municipal corporation for the same public purpose to which it has been so appropriated" is desired. This same act provides that "where property already appropriated to a public use or purpose by any person, firm or private corporation is sought to be taken by a municipal corporation for another public use or purpose, which is consistent with the continuation of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such municipal corporation, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures or improvements therein or thereon, so far as may be required by such common use."

The effect of this act is that the City may, by the exercise of its right of eminent domain, condemn the right to operate the Geary Street cars over that portion of Point Lobos Avenue from Thirty-third Avenue to Forty-second Avenue and make use of the United Railroad's tracks if desired. That is, if the City so determines it may condemn either the right to occupy the same street and construct thereon its own tracks, or it may condemn the right to occupy and use the same tracks used by the United Railroads, the Court, of course, fixing the amount of damages to be paid to the United Railroads in either case.

Third. Right of Occupation.

Under the provisions of Senate Bill No. 1237, which was approved by the Governor April 24th, 1911, and which becomes effective sixty days thereafter, the City is authorized to occupy any street within the City limits which is now or which may

hereafter be occupied by another street railway, by paying to the owner a proportionate amount of the cost of construction of such tracks as the City may elect to use. This Act, amending Section 499 of the Civil Code, removes the five-block limitation and authorizes a city to occupy any street used by another railroad line. Under its provisions, when it becomes effective, the City may, if it so elects, occupy the same tracks owned by the United Railroads over that portion of Point Lobos Avenue from Thirty-third Avenue to Forty-second Avenue by paying to the United Railroads an equal portion of the cost of construction thereof. Or the City may occupy a different portion of the same street from Thirty-third Avenue to Forty-second Avenue without the payment of any damages to the United Railroads for the use thereof.

Fourth. *Change of Cliff Avenue.*

The City may, if it does not desire to adopt any of the foregoing courses, alter the lines of Cliff Avenue so that the point of intersection of the southerly line thereof with Point Lobos Avenue will be at Thirty-eighth Avenue instead of Forty-second Avenue, so that the distance upon Point Lobos Avenue which will be used jointly by the City and the United Railroads will be but five blocks. This will enable the City to meet the conditions, if they are such, in the bond proceedings, that the municipal line shall proceed over Point Lobos Avenue to Cliff Avenue and thence over Cliff Avenue to a convenient terminal near the ocean.

Fifth. *Final Hearing of Injunction.*

It is to be borne in mind that the injunction now existing against the City is merely a temporary injunction and that the case has not yet been heard upon its merits. In the answer filed by the City in the Circuit Court it is set up that at the time the Sutro franchise was granted in 1894, which franchise has since been assigned to the United Railroads, Point Lobos Avenue was under the sole jurisdiction of the Board of Park Commissioners created under the statutes of the State. That the Board of Park Commissioners never has had

and does not now possess the power to grant any street railway franchises over any portion of the land under its jurisdiction, and that the Board of Supervisors was without power to grant a franchise over Point Lobos Avenue while that street was under the jurisdiction of the Park Commissioners and held by them in trust solely for park purposes. When the action, therefore, comes to trial upon its merits, the City should be able to sustain its contention that the franchise of the United Railroads to operate on any portion of Point Lobos Avenue is invalid for these reasons. Furthermore, the injunction does not prevent any of the proceedings mentioned in the second, third and fourth subdivisions hereof, that injunction being based solely upon the terms of Section 499 of the Civil Code before its amendment in 1911.

The foregoing present the various methods by which the City is enabled to remove the so-called obstacles to the construction of the Geary Street road in accordance with the original project. Any of these methods is sufficient to reach the purposes of the City.

Third.

Ownership of Rails.

Your third inquiry presents some difficulty. In the first place, it may be taken as conceded that the rails now used by the Geary Street Railroad Company are the property of that company. This was so held in the action entitled *Cleveland Electric Railway Company vs. Cleveland*, 137 Fed., 111, and approved by the Supreme Court of the United States in 204 U. S., 116; 51 L. Ed., 399, at page 410.

Power to Remove Rails.

The Geary Street Company is now operating under a temporary permit of the Board of Supervisors contained in Resolution No. 1285 (New Series) whereby the company is authorized to continue the operation of its cars during the pleasure of the Board and upon the express condition that the permit may be revoked at one day's notice. Upon the revocation of

the permit, as herein provided, the further continuance of the operation of the cars or the maintenance of the tracks upon the streets becomes a public nuisance which may be abated by the City acting through its Board of Public Works. The maintenance of the tracks upon the streets is in the same category as the maintenance of a fence or building in a public street and is such a nuisance as may be abated either by the City or an abutting property owner.

As to the first proposition herein the Supreme Court of this State has sustained the right of the Board of Public Works to abate such a nuisance and to remove the obstructions from the street in an action entitled *Nerio vs. Maestretti*, 154 Cal., 580. See also *Finch vs. Riverside and Arlington Ry. Co.*, 87 Cal., 597; *Hart vs. Buckner*, 54 Fed., 925; *Louisville, Etc., Ry. Co. vs. Mobile*, 124 Ala., 162, 26 So., 895; *Pittsburg, Etc., Ry. Co. vs. Hood*, 94 Fed., 618.

The procedure which may be adopted by the City is as follows: Notice should be given of the revocation of the permit to operate upon the street and demand should be made upon the Geary Street Railroad Company to remove all tracks and appurtenances from the streets within a reasonable time. If, at the expiration of such time, the company fails to move, and, in the judgment of the Board of Supervisors, no further time is reasonable, then the Supervisors should direct the Board of Public Works to tear up and remove the tracks and obstructions on the streets, preserving the property, so far as possible, for delivery to the company.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

Substitute Bond on Behalf of Home Telephone Co., Bay Cities Home Telephone Co. Should Join in Petition for Acceptance of this Bond in Lieu of Former Bond.

May 5th, 1911.

Gentlemen: I am in receipt of your request for an opinion under date of May 2nd, which reads as follows:

"I beg to inform you that the Home Telephone Company has filed with the Board of Supervisors a substitute bond to take the place of the one formerly given in the Aetna Indemnity Company. As they are quite anxious to have this matter settled so as to avoid the payment of premiums to the two different companies, I am forwarding this new bond to you to have you pass upon the correctness of the same, and, if possible, advise the Finance Committee on or before next Friday, May 5th, in order that the matter may be disposed of at the Committee's meeting on that day.

I do not note, in the reading of the new bond, any specific mention of assuming the liability from a date prior to that of its being entered into; in other words, nothing is said as to assuming the liability covered in the former bond."

In reply thereto would state that I have examined the bond and under the provisions of a certain act entitled "An act providing for the cancellation of bonds given to secure the performance of the terms and conditions of franchises or privileges granted by the legislative or other governing body of counties or municipalities, * * * "

The bond in this case, I believe, is proper and the only one that the Bay Cities Home Telephone Company can be compelled to give.

I note in your request that you state that there is no specific mention of assuming the liability from a date prior to that of its being entered into. However, in reply to this would state:

1st: That it is not at all clear under this bond but that such liability may be assumed, and

2nd. Considering the conditions, for the fulfilment of which this bond was given and the language of the act above referred to, I believe this bond will have to be accepted and will prove sufficient.

I think it well that the Bay Cities Home Telephone Company should join in the petition to the Board for the acceptance of this bond in lieu of the former bond, owing to the fact that some question might be raised as to the authority of the representative of the Receiver for the Aetna Indemnity Company, who has made the petition for the substitution.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Board of Supervisors is Without Power to Refund Taxes
Except in the Cases Specifically Provided For by Sec.
3804 Political Code.**

May 8, 1911.

Gentlemen: I am in receipt of your request for an opinion as follows:

“I am directed by the Finance Committee of the Board of Supervisors to refer to you the undermentioned petitions, enclosed herewith, for return of delinquent taxes:

Mary I. Kollet, Claim for \$9.58. Claimant alleges that she was robbed while standing in line in the Tax Collector's office on November 28, 1910, of her tax money, \$83.00, and being unable to procure any more money on that day before the office closed, her taxes became delinquent.

Rev. W. Acton, Pacific Coast Agent, Board of Missions, M. E. Church South, Claim for \$43.15. New York draft was forwarded by Treasurer of Missions, from its office in Nashville, Tenn., in payment of taxes, and was received by the Tax Collector on November 28, 1910. The Tax Collector refusing to accept the draft as cash, the taxes became delinquent.

Kindly advise the Finance Committee, with return of petitions, as to the legality of making refund of the amounts claimed."

Opinion.

In reply will state that the only authority conferred by law upon the Board of Supervisors to refund taxes is the authority granted under Section 3804 of the Political Code of the State of California, which Section reads as follows:

"Sec. 3804. Taxes illegally collected to be refunded.

Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected or any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed, by reason of a clerical error of the assessor, as to the excess in such cases, or any tax heretofore or hereafter paid upon an erroneous assessment of improvements on real estate not in fact in existence when said tax became a lien, may, by order of the Board of Supervisors, be refunded by the County Treasurer. Whenever any payment shall have been made to the State Treasurer, by the County Treasurer, as provided by Section 3865 and Section 3866 of this code, and it shall afterwards appear to the satisfaction of the Board of Supervisors, that a portion of the money so paid should be refunded as herein provided, said Board of Supervisors may refund such portion of the said taxes, penalties and costs so paid to the said treasurer to the person entitled to the same out of the general fund, and upon the rendering of the report required by Section 3668 of this Code, the Auditor shall certify to the Controller, in such form as the Controller may prescribe, all amounts so refunded, and in the next settlement of the County Treasurer with the State the Controller, if satisfied of the legality of such refunding, by the said Board, shall give such treasurer credit for the State's portion of the amounts so refunded as prescribed in Section 3871 of this code; provided further, that where the taxes, penalties and costs herein referred to are levied in behalf of any school dis-

trict, municipality or other public or municipal corporation, and said corporation has money in the County Treasury, said order to refund shall not be made except upon a certified copy of an order of the governing body of such corporation authorizing said payment, in which case the amount refunded shall be paid by the County Treasurer from the county fund of such school district, or from the appropriate fund of such corporation; provided further, however, that no order of the Board of Supervisors to refund taxes, penalties or costs shall be made except upon a verified claim therefor filed within three years after the making of the payment sought to be refunded."

The reading of this section will show that the Board of Supervisors has authority to refund taxes only where the same have been paid more than once, or have been erroneously or illegally collected, or have been paid upon an assessment in excess of the cash value of the property assessed because of clerical error, or where the taxes have been paid upon an erroneous assessment of improvements upon real estate not in existence at the time of the assessment.

The taxes referred to in your request for an opinion were not taxes paid under any of these conditions and are therefore not taxes which your Board is given authority to refund.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Widow of a Police Sergeant, Not Killed in the Performance of His Duties, not Entitled to a Pension Under Circumstances Stated.

May 9th, 1911.

Gentlemen: I am in receipt of your communication as follows:

"William F. Brophy was appointed a member of the Police Department of the City and County of San Francisco on Feb-

ruary 11, 1892, and was promoted to the rank of Sergeant on April 4th, 1898, in which rank he served continuously up to the time of his death, which occurred on September 13, 1908.

Immediately after the death of Sergeant Brophy, his widow, Josephine Brophy filed an application with the Board of Police Relief & Pension Fund Commissioners, under the provisions of Section 4, Chapter X, Article VIII of the Charter, for a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death. This application was heard by the Board of Police Relief & Pension Fund Commissioners on November 5th, 1908, and was denied on the ground that the said Sergeant Brophy was not killed in the performance of his duties.

On July 2, 1909, Mrs. Josephine Brophy petitioned the Board of Police Relief & Pension Fund Commissioners to be allowed the sum of \$398.00, under the provisions of Section 6, Chapter X, Article VIII of the Charter; the said sum being the amount retained by the Treasurer from the pay of Sergeant Brophy while he was a member of the Department. This money was paid by the Treasurer and accepted by Mrs. Brophy.

On December 29, 1910, the said Mrs. Josephine Brophy, petitioned the Board of Police Relief & Pension Fund Commissioners for a rehearing of her application, which was denied on November 5, 1908, for a monthly pension of one-half of the salary of her deceased husband, and requested permission to return the said sum of \$398, which was paid to her on July 2, 1909.

What we desire to be informed upon is whether or not the acceptance of the said \$398 by Mrs. Brophy was payment in full of all claims against the Pension Fund, and if this Board can accept the return of this money and grant Mrs. Brophy a monthly pension under the provisions of Section 4, Chapter X, Article VIII of the Charter?"

Opinion.

In reply you are advised that the petition of Mrs. Brophy for a monthly pension under the provisions of Section 4, Chap-

ter X, Article VIII of the Charter should not be allowed for two reasons:

First. The Board of Police Relief and Pension Fund Commissioners on November 5, 1908, denied an identical application of Mrs. Brophy's and of course this finding of that Board cannot be overturned by the Board as constituted later. If this were not so there would be no finality to any such findings of any such Board.

Second. Mrs. Brophy has, by her action in petitioning for the sum of money retained out of her husband's salary on the theory that he died a natural death, this claim having been made under Section 6 of Chapter X of Article VIII of the Charter, estopped herself from any claim that her husband was killed in the performance of his duties as contemplated by the terms of Section 4 of the above section and article of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Relief and Pension Fund Commissioners.

Water Supplied to Fire Boats (Except for a Technical Omission in the Water Rates Ordinance) Should Cost the Same as Water Furnished for Fire Purposes.

May 15th, 1911.

Gentlemen: I am in receipt of your communication requesting further advice as to matters covered by my opinion of December 16, 1910, as to payment for water furnished fire boats. Such communication reads as follows:

“Referring to your letter of December 16, 1910, advising the Finance Committee relative to payment for water furnished the fire boat station and fire boats, I am directed by said committee to call your attention to a point in connection

therewith which has been raised by the Spring Valley Water Company.

You state that among other facts you were informed that the water furnished for steam in the boilers of the fire boat is drawn from a hydrant located on the wharf. You conclude that as the fire boat does not get its water from the fire house on the wharf, which you regard as a public building, that payment for water for such fire boat cannot be made out of the appropriation for water for public buildings, but that as it is furnished from a hydrant, payment can be charged against the appropriation for hydrants.

The point raised by the Spring Valley Water Company is that the water drawn by the fire boats for their boilers is obtained from a plug attached to the company's pipes on the wharf, and that said plug is in no sense a fire hydrant, the City and County maintaining no fire hydrants on the water front east of East Street. This statement of the Spring Valley Water Company is confirmed by the Fire Department.

Inasmuch as the portion of your opinion relating to payment for water furnished the fire boats for their boilers is based upon the supposition that the plug on the wharf, from which the fire boats obtain their water, is a hydrant, the Finance Committee desires me to call your attention to the facts as stated in the foregoing, and to request that you advise said Committee in what way your opinion would be amended in view of said plug not being a hydrant maintained by the City and County."

Assuming for the purposes of this opinion that the facts are as indicated in your communication, that is, that the plug from which the fire boats receive the water for the boilers on the water front is not a hydrant, there is an evident omission in the Water Rates Ordinance to provide for this particular case.

My opinion is, therefore, that Section 10 of the Water Rates Ordinance adopted by the Board of Supervisors on June 22, 1910, fixing water rates for the year 1910-11 would govern in this matter. That Section 10 provides "water furnished for any and all purposes not embraced in the above shall be sup-

plied by meter at the following rates." (Certain detailed meter rates then being designated), would be the controlling section of the Water Rates Ordinance.

This, then, leads to the conclusion that the charge for these water rates must be made against the item of the 1910-11 budget, "Fire Department. Maintenance and Expense \$152,000" as, the other item "Water for Municipal Purposes—hydrants, \$130,500" would not be properly chargeable under the facts as you state them and the item "Public Buildings, excepting schools, \$20,000" would not be properly chargeable as indicated in my opinion of December 16, 1910.

There would seem to be no good reason, other than the technical omission provided in the Water Rates Ordinance for this case, why water furnished to fire boats for fire purposes should be paid for at any different rate than water furnished for fire purposes through hydrants; and I would respectfully recommend that provision be made in the next water rates ordinance fixing a rate for water furnished to fire boats.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**The Recent Constitutional Amendment does not Exempt the
United Railroads from Payment of Percentages Due the
City Under its Franchises.**

May 20th, 1911.

Gentlemen: I am in receipt of your query under date of May 15th, asking me whether the United Railroads can claim exemption under the new State Corporation Tax Law from payment of percentages due the City and County of San Francisco under its franchises, and what procedure to take to prevent any undue delay on the part of the company in filing its statement.

Opinion.

Constitutional Amendment No. 1, adopted November 8, 1910, furnishes a scheme for the separation of State and local taxation, providing for the taxation of public service and other corporations for the benefit of the State. The Constitutional Amendment so adopted adds to Article XIII of the Constitution a new section numbered 14, reading as follows:

“Section 14. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; * * * and taxes upon all franchises of any kind and nature, shall be entirely and exclusively for State purposes, and shall be levied, assessed and collected in the manner hereinafter provided.

The word ‘company’ as used in this section shall include persons, partnerships, joint stock associations, companies and corporations.

(a) All railroad companies, including street railways, whether operated in one or more counties; * * * shall, annually pay to the State a tax upon their franchises, roadways, road-beds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other properties, or any part thereof, used exclusively in the operation of their business in this State, computed as follows: * * * such taxes shall be in lieu of all other taxes and licenses, State, County and Municipal, upon the property above enumerated of such companies except as otherwise in this section provided; PROVIDED, that nothing herein shall be construed to release any such companies from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this State.”

It is further provided in subdivision b of Section 14 that the Legislature shall pass all laws necessary to carry this section into effect, and in pursuance of this authority the Legislature of the State of California adopted a measure which was

approved on April 1, 1911, carrying into effect Section 14 of Article XIII above mentioned.

In this Act, which is to be found in Chapter 335 of the Chaptered Laws of the Session of 1911, Section 6 provides:

“Nothing in this Act shall be construed to release any company from the payment of any amount agreed to be paid or required by law to be paid, now or hereafter, for any special privilege or franchise granted by any of the municipal authorities of this State.”

From the foregoing it is quite plain that the United Railroads can claim no exemption, under what is known as the State Corporation Tax Law, from payment of percentages to the City and County of San Francisco of moneys by way of percentage on receipts or otherwise.

If the United Railroads fails to file with the Board of Supervisors a statement of passenger receipts for the year 1910, the Board of Supervisors has the right to examine the books of that company, through the medium of an expert accountant, and ascertain the amount of percentages due the City.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Franchise Granted United Railroads on Bryant Street Between 26th and Army Streets Has Been Forfeited Under Section 502 C. C.

May 22nd, 1911.

Gentlemen: I am in receipt of a request from the Public Utilities Committee of your Board, under date of May 4th, 1911, wherein an opinion is asked as to whether the franchise granted to the United Railroads on Bryant Street between Twenty-sixth and Army Streets has been forfeited. Supplementary to such request I have your communication of May

11th, 1911, wherein you advise that this franchise was granted August 1st, 1894, by Order No. 2788 of the Board of Supervisors; that the road was never constructed as designated by such franchise; that, at the time the franchise was granted, that portion of Bryant Street was marsh land, but, nevertheless, it was, and ever since has been, an open public street.

The terms of the franchise as contained in Section 2 of Order No. 2788, above referred to, require the work to construct said road to be commenced within one year from the date of the passage of the order and to be completed within three years thereafter. The records show that on August 2nd, 1894, this franchise was accepted by the grantee, the Market Street Railway Company, and thereupon became a contract between the City and the grantee.

At the time of the passage of the order above referred to Section 502 of the Civil Code of the State of California read as follows:

“Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of the articles of incorporation and the same must be completed within three years thereafter. Failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation, with the consent of the authorities granting the right of way—such abandonment and consent to be in writing.”

This section was amended in 1895 by authorizing the authorities granting the franchise to specify a different time for commencement and completion of the work within certain limits and authorizing extensions of the time for completion, but such extensions were limited to a period of one year in addition to that specified in the franchise.

As the franchise contained in Order No. 2788 was granted, and the time for the completion of the work thereunder expired, prior to the time when the Charter of the City and County went into effect, we are compelled to look to the Gen-

eral Laws of the State and not to the Charter for a determination of the respective rights of the City and of the company.

The same question was before the Supreme Court of this State in the action entitled *Los Angeles Railway Company v. City of Los Angeles*, reported in 152 Cal. 242. In that action the facts were these: The City of Los Angeles granted a franchise to the Los Angeles Electric Railway Company for the use of certain streets on the 11th day of May, 1897, and stipulated in the franchise that the work of construction must commence within six months and be completed within eighteen months from the passage of the ordinance. By a subsequent ordinance the time of completion was extended six months, or to May 11th, 1899. At that time only one and three-quarters miles of the four and three-quarters miles covered by the franchise had been completed. On May 1st, 1903, the street railway company commenced the construction of the remaining portions of the work but was stopped by the Superintendent of Streets and the police officers of the City upon the ground that the franchise had become forfeited for failure to complete the work within the time prescribed. The street railway company sought an injunction to restrain the officers from so interfering with the work, but this injunction was denied by the trial court and upon appeal the order of the trial court was sustained upon the sole ground that Section 502 of the Civil Code was self-executing and that the franchise became forfeited ipso facto upon the failure of the grantee to complete the work within the time prescribed.

In that case the street railway company argued that the franchise did not become forfeited until the Court had judicially determined the forfeiture at the suit of the Attorney General and upon a trial of the facts, but the Supreme Court held against this contention and said that such a suit was not necessary.

This case is an exact parallel with that presented in your inquiry and upon the rule therein expressed you are advised that the franchise contained in Order No. 2788 and covering that portion of Bryant Street between Twenty-sixth and Army

Streets has been forfeited by the failure of the grantee to comply with the conditions of Section 502 of the Civil Code.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Board of Works Under Section 9 of Article VI of the Charter
may Permit a Proeprty Owner to lay Temporarily a
One Inch Water Supply Pipe Under the Sidewalk and
Within the Curb.**

May 26th, 1911.

Gentlemen: I am in receipt of your communication of May 13th, 1911, which read as follows:

“An application having been filed with this Board by one John Hayes, an owner of improved realty, situated on the southerly line of Grove Street, distant 100 feet from the easterly line of Cole Street with a frontage of 25 feet thereon, for permission to lay a one-inch water pipe temporarily, along and under the sidewalk fronting the property owned by one M. Foley with a frontage of 100 feet on said southerly line of Grove Street, running easterly from said easterly line of Cole Street, and immediately within the curb of said sidewalk, for the purposes of conveying water to his (Hayes') dwelling, from the water main laid in Cole Street, and the Board having given due consideration to the merits of the said application, granted the desired permission for such temporary use of said sidewalk. It appears from an investigation into the facts of the case, that Grove Street between Cole and Clayton Streets, has been improved by the construction on the roadway thereof, of a bituminous rock pavement; that said portion of Grove Street is within the zone where the Spring Valley Water Co., has refused to lay water mains; that the applicant Hayes, who recently built a dwelling on the said street, has by reason of such refusal to lay a water main in and along said street,

been compelled to carry water in buckets to his home for domestic purposes; that the opening up of the permanent pavement recently constructed on said Grove Street for the purpose of laying therein a temporary water pipe to connect with the water main in Cole Street, wherewith to convey water to applicant's home, and the restoration of the same, would entail a heavy burden of cost upon the applicant; that the outer side of the sidewalk area in front of the said Foley's property for a space of about 3 feet distant from the curb line and along the 100 feet frontage mentioned, is without any pavement or improvement whatever; and that the temporary use of such portion of said sidewalk, for the burying of the said water pipe therein, would not in any degree interfere with Foley's free and unobstructed use of said sidewalk, but such use would permit the applicant to obtain water for his home purposes at a comparatively trifling cost for the means of conveying it.

Now comes said Foley, and challenges the power of this Board to lawfully grant permission to said Hayes to temporarily utilize the said unimproved portion of the sidewalk in front of said (Foley's) lot, for the purpose and under the circumstances aforementioned, upon the theory that the lot owner has a vested right in and is entitled to the absolute and exclusive use of a sidewalk, (a portion of a public street), fronting his lot. * * *

You are respectfully requested to advise this Board as to the question herein involved."

Subdivision 1, Section 9, Article VI of the Charter of the City and County of San Francisco, in my opinion, covers this case. The portion of that subdivision applicable is as follows:

"The Board of Public Works shall have charge, superintendence and control, under such ordinances as may, from time to time, be adopted by the Supervisors.

1. Of all public ways, streets, avenues, lanes, alleys, places, courts, roads, highways and boulevards now opened or which may hereafter be opened in the City and County; of the manner of their use; * * * the laying down and taking up

of gas, steam and water pipes, pneumatic or other tubes or pipes, and sewers and drains, and determining the location thereof; * * *

Under these provisions of our Charter it is quite plain that the Board of Public Works has the right to permit the temporary use of either a street or sidewalk by a property owner for the purpose of laying down pipes therein connecting his property with a water main. This is a necessary use of the streets and sidewalks and the owners of adjacent property have no cause for complaint so long as the use of the street is not disturbed or interfered with and public improvements, such as sidewalks, sewers, etc., are not damaged so as to place a financial loss upon the adjacent property owners in their repair or replacement. Likewise the property owners have a right of protection against one, using the street for the purposes set forth in your request, injuring or destroying private property upon the sidewalk, such as lawns, trees or flowers.

I therefore advise you that you would be justified in granting the application of Mr. Hayes, but it should be upon the condition that no property owner shall be damaged in any of the ways herein indicated and full security for possible damage should be exacted.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

**A Stenographer of the Police Court not legally appointed is
not Entitled to Compensation.**

June 12th, 1911.

Dear Sir: I am in receipt of your communication of the 6th day of June, 1911, requesting advice as to the legality of the claim of Joseph Stevens for services rendered as a stenographer of the department of the Police Court presided over by Judge Sullivan. It appears from your communication that

Mr. Stevens was appointed as such stenographer by Judge Sullivan and claims the position solely by virtue of that appointment. It also appears that on the 1st day of May, 1911, a majority of the Police Judges of the Police Court of this City and County appointed Daniel V. Drew to the same position.

It further appears that the appointment of Mr. Stevens has been approved by the Civil Service Commission, the position of official stenographer of the Police Courts being within the classified civil service of the City and County of San Francisco. (See Section 11, Article XIII of the Charter.) Neither Mr. Drew nor Mr. Stevens, however, are upon the register of civil service eligibles for the position of official stenographer. Both appointments were made as temporary appointments there being at the present time no civil service eligible for that position.

Whether or not the claim for services by Mr. Stevens should be paid by you depends upon the legality of Mr. Stevens' appointment to the position. If he has been legally appointed, then he is entitled to the compensation attaching to the position. If he has not been legally appointed, then he can neither demand nor receive compensation for services rendered.

See—Shaw v. City and County of San Francisco, 10 Cal. App. Dec. 839, reported June 21, 1910.

Opinion.

Authority for the appointment of stenographers in the Police Courts is found in Section 11, Chapter VIII, Article V of the Charter, Ordinance No. 35 and Ordinance No. 245 (New Series). The Charter section provides that the "Police Judges may appoint not more than two competent stenographers." Ordinance No. 35 authorizes and empowers "the *judges* in said Police Court" to appoint one additional stenographer. Ordinance No. 245 (New Series) confers upon the *judge* of Police Court No. 3 the power to appoint an official stenographer for that department.

Inasmuch as Judge Sullivan does not sit in Department No. 3 Ordinance No. 245 (New Series) does not enter into the question. The validity of Mr. Stevens appointment must, therefore, depend upon whether he has been legally appointed under either the provisions of Section 11, Chapter XIII, Article V of the Charter or of Ordinance No. 35.

The terms of the Charter section and Ordinance No. 35 are the same. The power of appointment is conferred upon the Police Judges collectively and not upon an individual judge. The Charter in its adoption provided for *four* Police Judges. For those four Police Judges it created only two positions of stenographers. It could not have been intended, nor does the language of the Charter permit of such a construction, that each Judge of the Court had the power of appointing a stenographer. The appointment of stenographers was to be made by the Court, the four judges thereof acting collectively.

Ordinance No. 35 merely providing one additional stenographer to the two provided for by the Charter, the power of his appointment was placed where, under Section 35 of Article XVI, it should be placed, in the appointing body created by the Charter, viz, the four *judges* of the Police Court acting collectively. Judge Sullivan, therefore, has not been individually empowered by the Charter or by an Ordinance of the City and County of San Francisco to appoint a Police Court stenographer.

The Charter and Ordinances having provided for the appointment of Police Court stenographers, no power independent of the Charter and Ordinances exists in Judge Sullivan to appoint a stenographer. Such was the holding of the Supreme Court in *Elder vs. McDougald*, 145 Cal. 740.

In the *Elder* case it was contended that under and by virtue of Section 869 of the Penal Code, providing that committing magistrates shall have the power to appoint a reporter to take down testimony in preliminary examinations of persons accused of felony and to fix the reporter's compensation, independently conferred upon a Police Judge of the City and County of San Francisco, sitting as a committing magistrate,

the authority to appoint a stenographer for the purposes mentioned in Section 869 of the Penal Code.

The Court held, however, that the Charter provisions controlled and that no power to appoint Police Court stenographers existed in the judges of the Police Court other than that conferred upon them by the Charter. Section 869 of the Penal Code to that extent had been superseded by the Charter.

In view of the unambiguous language of the Charter and Ordinance No. 35 and the holding in *Elder vs. McDougald*, supra, it follows that Mr. Stevens has not been legally appointed to the position which he now claims. ,

The approval of the Civil Service Commissioners cannot give validity to an appointment which is otherwise invalid. That approval was made under that portion of Section 10, Article XIII of the Charter which reads:

“To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this Article, can be made.”

That section neither confers upon an officer or department of the City government the power to make a temporary appointment not authorized either by the law or the Charter, simply by securing the approval of the Civil Service Commissioners of the appointment, nor does it confer upon the Civil Service Commissioners the power to authorize an officer or department of the city government to make a temporary appointment not permitted either by the law or the Charter. The purpose of the section is no more than this: When an officer or department has been authorized by the laws or the Charter to make an appointment coming within the civil service provisions of the Charter and there is no civil service eligible for the position, the officer or department may make a temporary appointment with the approval of the Civil Service Commissioners. The approval of the Civil Service Commis-

sioners is required for two reason: First—to call the attention of the Civil Service Commissioners that a position within Civil Service is being filled by one not a Civil Service eligible so that the Commissioners may proceed in line of their duty and hold examinations and create a Civil Service list from which the position may be filled, and second—to call attention to the fact of the appointment of a non-civil service eligible so that the Civil Service Commissioners may determine for themselves that the rules of Civil Service are not being violated. The approval of the Civil Service Commissioners is not to the individual appointed but to the validity of an appointment of a non-civil service eligible to the position. When the Charter or law confers upon an officer or department the power to make an appointment and the approval of the Civil Service Commission is requested to allow the appointment of a non-civil service eligible the legitimate inquiry of the Commissioners should extend no further than whether there is a civil service eligible for the position and whether the civil service rules are being violated. It does not properly extend to the wisdom of the particular choice made by the officer or department upon whom is conferred the power of appointment.

It is not my intention here to pass upon the right of Mr. Drew to the position which he claims as that matter is not before me. The sole question presented to me is whether Mr. Stevens is entitled to compensation as a Police Court stenographer. In my opinion he has not been legally appointed to that position and therefore under the ruling laid down in *Shaw vs. City and County*, supra, he has no legal claim for compensation.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

Sureties on Bonds Given for the Proper Performance of Public Work Cannot be Released Without other Sureties Satisfactory to the Board of Public Works.

June 14th, 1911.

Gentlemen: I am in receipt of your communication of June 9th, 1911, relative to the request of the sureties on the bonds of Michael Kiernan to be relieved from liability thereon. The bonds were furnished by Kiernan upon his entering into a contract with the Board of Public Works to do the plastering work required to be done in the construction of the Spring Valley School Building.

It appears that the contract was made and entered into on May 31st, 1910, and it was therein provided that the work contracted for was to be commenced within five calendar days from the receipt of written notice from the Board of Public Works and was to be completed within 100 calendar days thereafter.

On June 5th, 1911, the sureties on the bonds of Kiernan filed a written communication with the Board of Public Works wherein they stated that they wished to withdraw as sureties on the bonds. On June 6th, 1911, notice to commence work on the said building was served on the said Kiernan.

I am requested to advise your Board as to whether or not said sureties can now legally withdraw from their obligations.

One of the bonds provided that if the said Kiernan should well and truly perform or cause to be performed every and all the requirements of his contract as in said contract set forth, then the obligation of the bond was to be null and void, otherwise to remain in full force and effect. Upon that bond being executed to the City the sureties became bound to the City and a conditional liability to the City immediately arose, that liability being that if the said Kiernan neglected or refused to perform his contract then the bondsmen were to pay to the City and County the loss that the City suffered

by reason of Kiernan's failure, not to exceed the amount of the bond.

The second bond was given under the requirements of the Act of the Legislature of the State of California entitled "An Act to secure the payment of the claims of materialmen, mechanics or laborers employed by contractors on state, municipal or public work," approved March 27th, 1897. The condition of that bond is that if Kiernan fails to pay for any materials or supplies for the work to be contracted to be done or for any work or labor done thereon the sureties shall pay the amount, not exceeding the amount specified in the bond. Should, of course, Kiernan fail to do any work under his contract no liability will ever arise under the second bond. When, however, both bonds were executed to the City conditional liabilities were immediately created and the contractual status of the parties became fixed. The bonds became binding upon the sureties and I know of no statute or law which will now permit them to withdraw from these bonds. The law provides methods whereby sureties on the bond of officials may become released and likewise provides methods whereby the sureties on the bond of an administrator may also become released, but I know of no act which permits the bondsmen of a private bond, such as these bonds are, withdrawing from their obligations without the consent of the persons to whom they become bound.

I advise you therefore that the bondsmen on these bonds cannot be released without Kiernan substituting in their places sureties satisfactory to the Board of Public Works.

I return herewith the enclosures sent with your request.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Whether the Diversion of 600 Second-Feet of the Waters of
McCloud River would interfere with riparian rights or
with navigation, are questions of fact.**

June 16th, 1911.

Sir: I am in receipt of your communication of June 8th wherein you ask to be advised if it would be safe for the City to undertake the diversion of 600 second-feet of the low water discharge of the McCloud River without acquiring riparian rights below the point of diversion; also, if there would be likely to be any interference with the laws of the United States regarding the appropriation of navigable streams—in this case the Sacramento River—, of which the McCloud is one of the head waters.

In reply thereto you are advised:

1st: That the appropriation of waters under the laws of this State is always subject to the rights of prior riparian owners, and that no appropriator is safe, from a business standpoint, in diverting appropriated waters without either acquiring the riparian rights upon the same stream below the point of diversion or making satisfactory arrangements with such riparian owners for the use of the appropriated waters.

2nd: That the head waters of a navigable stream are always subject to appropriation under the State laws for irrigation, mining, domestic and other purposes, and, that the fact that the stream at a lower point is navigable does not affect the validity of such appropriation. All appropriations upon the head waters of navigable streams are subject, however, to the right of navigation and the diversion of such waters will be restrained to such extent as they may interfere with such navigation. (United States v. Rio Grande Dam & I Co., 174 U. S. 690, 43 L. Ed. 1136.)

Whether the appropriation and diversion of such waters is an interference with navigation is a question of fact which can be determined only from the circumstances of each particular case.

Therefore if the diversion of 600 second-feet of the waters of the McCloud River would interfere with the navigation of the Sacramento River the diversion would be restrained to the extent of such interference.

Respectfully,

PERCY V. LONG,

City Attorney.

City Engineer.

A Money Judgment against the Board of Education, affirmed upon appeal, is a claim which should be approved by your Board and paid out of certain funds.

June 22nd, 1911.

Gentlemen: I am in receipt of your letter of May 24th, 1911, requesting to be advised:

1st: Whether the claim of Walter Morgan v. The Board of Education on his judgment against said Board be a legal claim.

2nd: Whether the judgment be final.

3rd: Whether an appeal is still possible.

4th: If mandamus proceedings are taken would it do more than delay payment of the claim.

5th: If payment be delayed will the amount of judgment and costs be increased to the City.

I have examined the transcript on appeal in the case of Walter Morgan v. The Board of Education and have gleaned therefrom the following facts:

On August 3rd, 1896, the Board of Supervisors appropriated \$200,000 out of the funds of the fiscal year ending June 30th, 1897, for the erection of the high school to be known as the Mission High School and for the purpose of a site therefor. This sum of \$200,000 was raised by a special tax for said purpose provided in the budget for said fiscal year.

On November 30th, 1896, the Board of Education adopted plans and specifications for the Mission High School Building. On December 20th, 1896, the Board of Education opened bids for furnishing the heating and ventilating apparatus for the Mission High School and awarded the contract for furnishing the same to Walter Morgan and Company for the sum of \$9,496, and on December 31st, 1896, the Board of Education entered into a contract with Walter Morgan & Co., for the furnishing of said heating and ventilating apparatus. On March 10th, 1897, the Board of Education, at a regular meeting, adopted a resolution cancelling and annulling the contract with Walter Morgan & Co., and awarded the same to the Peck-Williamson Heating and Ventilating Company, and on March 12, 1897, the Board entered into a contract with the Peck-Williamson Heating and Ventilating Company for the furnishing of the heating and ventilating apparatus. Thereafter Walter Morgan & Co. sued the Board of Education for damages for breach of contract and recovered judgment in the amount of \$1988, which judgment was recorded September 12th, 1899, in Book 47 of Judgments at page 675. An appeal was regularly taken to the Supreme Court of the State of California and the judgment of the Superior Court was affirmed by the Supreme Court on the 10th of April, 1902.

The above facts are all that are necessary in order to answer your inquiry. It will be seen therefrom that the claim of Walter Morgan against the Board of Education for damages, having been reduced to a judgment and that judgment having been affirmed on appeal, it therefore constitutes a legal claim against the Board of Education, payable out of the moneys of the fiscal year 1896-7.

In answer to the second and third inquiries it is plain from what is stated above, that the judgment is final and that an appeal is no longer possible.

We now come to consider your fourth inquiry and in reply thereto will say that if mandamus proceedings be instituted against your Board to compel it to approve a demand for

the claim of Walter Morgan for the amount of his judgment, together with interest and costs, it would only result in delaying the approval of said demand as there is no doubt that in the end your Board must approve the same, payable out of the funds of the fiscal year 1896-7. While your Board must approve the demand, as above indicated, and while said judgment will continue to bear interest at the rate of 7 per cent per annum until paid, yet the fact that the claim is reduced to a judgment does not give it any greater force than any other legal claim against a municipality, the payment of which is limited to the funds of the fiscal year during which the liability or indebtedness was incurred.

Section 18 of Article XI of the Constitution of the State of California provides that "no county, city, town, township, Board of Education or School District shall incur any indebtedness or liability in any manner nor for any purpose exceeding in any year the income and revenue provided for such year."

From an examination of the cases interpreting the above section of the Constitution it is my opinion that your Board is without power to approve the demand of Walter Morgan for payment out of any funds of any fiscal year or out of any surplus funds of any fiscal year other than out of any funds that may be remaining of the fiscal year 1896-7.

You are therefore advised that your Board must approve the claim of Walter Morgan for \$3,809.32, the amount of his judgment, with interest, payable only out of the funds of the fiscal year 1896-7.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Education.

Charter Provisions Not Retroactive—Widow of a Fireman Killed Prior to Adoption of the Charter is not Entitled to a Pension.

June 29th, 1911.

Gentlemen: I am in receipt of your request for an opinion dated June 23rd, 1911, wherein you state that John Wilkinson, a member of the San Francisco Fire Department, was killed at a fire in 1887 and that his widow has now applied for a pension. You then ask to be advised whether your Commission has power to grant such pension.

Opinion.

The history of the Firemens' Pension Law of this State shows that an act was passed in 1885 (Statutes 1885, page 13) which provided for the payment of pensions to disabled firemen, and to the widow in case of the death of the fireman, out of a fund proposed to be created by a tax upon the premiums issued by the various life insurance companies operating within the State. This Act was amended by the Act of March 4th, 1887 (Statutes 1887, page 15) and the entire scheme was declared unconstitutional by the decision of the Supreme Court of this State on November 10th, 1887, in the action entitled City and County of San Francisco vs. Liverpool and London and Globe Insurance Company, et al., wherein it was held that the tax proposed to be levied was for a municipal purpose and hence in violation of Section 12 of Article XI of the Constitution prohibiting the Legislature from imposing taxes upon "counties, cities, towns or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town or other municipal purposes."

In 1889 another act of the Legislature was passed (Statutes 1889, page 108) authorizing the Boards of Supervisors or other governing authority of counties, cities and counties, cities and towns of the State to provide a fund for the pensioning of aged or disabled firemen, but no provision was

made for a pension to the widow in case of the death of a fireman. This was amended by the Act of 1901 (Statutes 1901, page 575) but still no provision was made for payment of a pension to a widow.

A new act was passed on March 7th, 1901, which created a Firemen's Relief Pension Fund for the various cities of the State, but as this act was passed subsequent to the taking effect of the Charter its provisions of course do not apply to this City and County.

Though the Charter provisions are aimed to relieve the widow of a member of the department killed while in the performance of his duty, I am of the opinion that under the authority of the decision of our Supreme Court in *Clarke vs. Police Life and Health Insurance Board*, 127 Cal. 550, the provisions of the Charter are not retroactive to the extent of authorizing payment of a pension to a widow of a member of the department killed prior to the time the Charter went into effect.

In interpreting the provisions of Section 3 of the Act of 1889, as amended by the Act of March 2nd, 1897, (which is almost in identical language to that of our Charter) the Supreme Court said:

"We think it clear from a reading of the amended section, that it has no application to one whose connection with the department was at an end before the passage of the amending act. It simply provides that in case of an officer, who is a member of the force, who is sixty years of age, and who has served twenty years in the aggregate, the board may, in its discretion, retire him on half pay, or retain him in active service at full pay. It does not apply to a person over whom the board has no power or authority whatever."

Therefore, inasmuch as there was no provision for the payment of a widow's pension for the death of a member of the Fire Department prior to the adoption of the Charter, and inasmuch as the provisions of the Charter cannot benefit one whose membership in the Department has ceased prior to the

taking affect of the Charter, you are respectfully advised that your Commission is without power to grant the pension prayed for.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Panama Pacific Exposition Co., a Private Corporation—Expenses of an Election to fix the Site of the Exposition Not a Proper Charge Against the Treasury.

July 1st, 1911.

Gentlemen: I am in receipt of your communication under date of June 28th, as follows:

“I am directed by the Special Committee of the Board of Supervisors appointed by His Honor the Mayor to consider the advisability of calling a Special Election to vote upon a site for the Panama Pacific Exposition, to request you to furnish said Committee with an opinion as to the power of the Board of Supervisors to call such Special Election for the purpose of voting upon this question and to incur the expenses incident thereto.”

Opinion.

The Panama Pacific Exposition Company is a corporation, as I am informed, organized, acting and doing business under the laws of the State of California, which corporation was created for the purpose of holding an international exposition in the City and County of San Francisco. Such corporation is private in its nature and controls exclusively its own affairs. While the people of this City and County and the people of the State have authorized the expending of public moneys to the amount of \$10,000,000 in aid of such an exposition as contemplated, such financial aid in no wise changes

the character of the corporation or permits of official interference in its internal affairs. The most that the electorate of the City and County of San Francisco could do in the way of influencing a choice of a site for the exposition would be merely to express an opinion and there is no authority in the Charter for the calling of an election for such a purpose.

The Charter gives the Board of Supervisors power and imposes upon that body the duty of calling elections for purposes of amending the Charter, purchasing lands having a value in excess of \$50,000 and to authorize the construction and acquisition of public utilities and for the issuance of bonds for such other purposes as the Charter may permit. Also under what is known as the initiative and referendum features of the Charter a certain percentage of the voters can demand an election at which measures shall be voted upon which might be lawfully passed by the Board of Supervisors or any department of the city government having such power.

The test in such case is whether the Supervisors have the power to pass a particular measure. If so, they also have the power to refer such measure to the electorate for its action or the electorate itself has the power to initiate proceedings for the calling of an election. Neither the Board of Supervisors nor the electorate can in any manner call for an expression of opinion on matters clearly outside of municipal affairs.

“Any declaration of policy or principle of legislation may be submitted to the electors in the manner provided for the submission of ordinances; and when approved by a majority of the voters voting at any election, it shall thereupon be the duty of the Board of Supervisors or other legislative body to enact an ordinance or ordinances to carry such policies or principles into effect, subject to the referendum provisions of Chapter IV of Article XI of this Charter.”

Sec. 13, Chap. IV, Art. XI of the Charter.

It is unnecessary to enumerate specifically the particular instances in which special elections are authorized by the Charter, but it is sufficient that the charter contains no auth-

orization to the Board of Supervisors or to the electorate for the calling of a special election for such purpose as is indicated in your communication and no such authorization being found, the expense attendant upon the calling of such a special election would not be a proper charge against the Treasury.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**When the Main Administration of an Estate of a Decedent
Is Here, Certain Securities Belonging to the Estate,
though outside of this State, are Taxable here.**

July 12th, 1911.

Sir: I am in receipt of your communication of July 7th relative to the question of the assessment of certain taxable securities and solvent credits belonging to the estate of Fabian Toplitz, deceased, and which are now being held in New York. From your communication it appears that the estate of Toplitz is being administered in the City and County of San Francisco. You do not state clearly that Fabian was a resident of the City and County of San Francisco and that the main administration of his estate is being had in this jurisdiction. I judge, however, that these are the facts. You do not set forth the nature or character of the securities further than to say that they are "taxable securities and solvent credits". I assume, however, that they are securities on property outside of the State of California. Assuming, then, that I have stated the facts of the case correctly, the question presented is this: If a person dies a resident of this State and the main administration of his estate is in this jurisdiction, is it proper to tax for securities otherwise taxable, notwithstanding that they are not in the possession of the per-

sonal representative of the deceased in this State, but are in another jurisdiction?

That question has been directly answered in the affirmative in the case of *Estate of Fair*, 128 Cal., p. 611, and in the case of *Stanford vs. San Francisco*, 131 Cal., p. 34. In the *Stanford* case it was held that shares of stock of foreign corporations, the certificates of which were not in the State nor in the actual possession of the executors, but were in New York City, where they were held as collateral security, were nevertheless subject to taxation in this State.

In *Stanford vs. San Francisco*, the Court said:

“The testator in the present case died while a resident of California, and in California his estate is being administered by his administratrix; among other of the properties of her testator the executrix inventoried and thereby charged herself with the personal property in question as part of the estate committed to her charge. Unquestionably this property is ‘held—that is, owned’, in California, and has ‘its locality for purposes of taxation at the place’ where so owned.”

In view of the *Fair* case and the *Stanford* case there can be no doubt that the securities in question are subject to taxation in this State, if I am correct in my statement of the facts.

Respectfully,

PERCY V. LONG,

City Attorney.

The Assessor.

Board of Supervisors May, by Ordinance, close certain streets for the use of the Panama-Pacific International Exposition.

July 24th, 1911.

Gentlemen: I am in receipt of your communication under date of June 18th, as follows:

“I have been directed by the Board of Supervisors to forward to you the enclosed petition, which was submitted to the

Board at yesterday's meeting, for the purpose of securing from you an opinion upon the following questions:

What right, if any, has the Board of Supervisors to authorize or empower the Panama-Pacific International Exposition Company, a corporation organized under the laws of the State of California, to temporarily close streets in the City and County of San Francisco, located in the section of Harbor View, where is contemplated the locating of a site for the Panama-Pacific Exposition? These streets that are desired to be closed would cover about a dozen or fifteen blocks.

What right, if any, has the Board of Supervisors at this time to hold a special election and incur the expenditure necessary for the same, in submitting to the people the question of closing streets in the Harbor View section of the City?"

Opinion.

Answering question number two first, you are advised that under Section 8 of Article XI of the Constitution of the State of California, the Board of Supervisors is limited by that provision to submitting amendments to the Charter not oftener than once in two years.

"The Charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the City to the qualified electors thereof at a general or special election held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such City, and ratified by a majority of the electors voting thereon, and approved by the Legislature as herein provided for the approval of the Charter."

As not more than one year has elapsed since Charter amendments were last submitted to the electors of San Francisco, your body is not at this time permitted to submit new amendments.

Answering query number one, you are advised that the Board of Supervisors cannot without charter amendment authorize the Panama-Pacific International Exposition Company to temporarily, or otherwise, close streets in the City and County of San Francisco. That body is at the present time authorized by Charter provisions to close streets west of Twentieth Avenue under certain conditions.

If it is desired to close streets in portions of the City other than westerly from Twentieth Avenue, the only way in which such streets could be closed would be by ordinance of the Board of Supervisors in accordance with the provisions of Sec. 1, Chap. III, Art. VI, of the Charter, which reads as follows:

“Whenever the public interest or convenience may require, the Supervisors shall have full power and authority to order the opening, extending, widening, straightening or closing up, in whole or in part, of any street, avenue, lane, alley, court, or place within the City and County, and to condemn and acquire any and all land and property necessary and convenient for that purpose.”

I am satisfied that as the Panama-Pacific International Exposition is to commemorate events which are of public interest and importance, as is evidenced by Senate Joint Resolution No. 7, adopted by the Legislature of the State of California on the 23rd day of January, 1911, by the amendment to the Constitution of the State of California providing for a special tax of five million dollars for “an exposition in commemoration of the completion of the Panama Canal”; the further authorization by Constitutional Amendment permitting the City and County of San Francisco to amend its Charter so as to issue municipal bonds in aid of “an exposition to be held in the City and County of San Francisco to celebrate the completion of the Panama Canal”; the adoption of an amendment to the Charter of the City and County of San Francisco authorizing the incurring of a bonded indebtedness of \$5,000,000 “for the purpose of an international exposition to be held in the City and County of San Francisco to celebrate the

completion of the Panama Canal", and the Joint Resolution of the 61st Congress, approved by the President of the United States on the 15th of February, 1911, which reads as follows:

"Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever it shall be shown to the satisfaction of the President of the United States that a suitable site has been selected, and that the sum of not less than fifteen million dollars will be available to enable the Panama-Pacific International Exposition Company, a corporation organized and existing under and by virtue of the laws of the State of California, for the purpose of inaugurating, carrying forward and holding an exposition at the City and County of San Francisco, California, on or about the first day of January, nineteen hundred and fifteen, to celebrate the completion and opening of the Panama Canal, and also the four hundredth anniversary of the discovery of the Pacific Ocean, the President of the United States be, and he hereby is, authorized and respectfully requested, by proclamation or in such manner as he may deem proper, to invite all foreign countries and nations to such proposed exposition, with a request that they participate therein."

That the holding of such exposition as is contemplated, is a matter of great public interest within the meaning of Sec. 1, Chap. III, Art. VI, of our Charter.

"The decisions justify the use of the streets, under suitable restrictions and conditions, for public displays on occasions of celebration of holidays, and the commemoration of important public events." (Sec. 1174, *Dillon on Municipal Corporations*, 5th Ed.; *Simon vs. City of Atlanta*, 67 Geo., 618; *Town of Marion vs. Skillman*, 26 N. E., 678; *City of Mt. Carmel vs. Shaw*, 39 N. E., 584.)

Sec. 1, Chap. III, Art. VI of the Charter was adopted in 1907, after the fire and with the other sections in that chapter were substituted for the sections as they stood in the Charter previous to this amendment. These amendments were intended to confer upon the Board of Supervisors discretionary

powers in the matter of closing streets, protecting at all times the rights of abutting property owners to ingress and egress, or to be compensated for such deprivation. This section follows very closely the language of the Street Improvement Act of 1889, which has been passed upon by the Supreme Court of this State frequently.

In *Brown vs. Board of Supervisors*, 124 Cal., p. 278, the Supreme Court uses this language:

“The authority to close a street ‘in whole or in part,’ which is conferred by the Act of March 7, 1889, authorizes the board to diminish the width of the street, and the adoption of the order is a determination by the board that the public interest or convenience requires the improvement. ‘The legislature has by the statute referred to conferred upon that body the power to open and close streets ‘whenever the public interest or convenience may require,’ and the determination of this question by that body is not open for review by the courts.’ (*Symons v. San Francisco*, 115 Cal. 555.)”

To the same effect is *Bigelow v. Ballerino*, 111 Cal., 559.

You are therefore advised that the Board of Supervisors can by Ordinance, as I have hitherto advised, close either permanently or temporarily such streets as may be necessary to use for the purpose of the Panama-Pacific International Exposition, making such regulations as will protect abutting property owners.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

The Board of Public Works may Reconsider its Action Rejecting all Bids and Award the Contract to the Lowest Lawful Bidder.

July 22nd, 1911.

Gentlemen: I am in receipt of your communication with reference to the proceeding leading up to the awarding to the Healy-Tibbitts Construction Co., of a contract for the construction of sewers and appurtenances in Section "D-2" of the North Point Main Sewer. It appears from your communication that in response to a notice by the Board of Public Works inviting sealed proposals for the doing of said work several contractors submitted bids. Among those bids submitted was one by John Daniel in the sum of \$90,778.25, and one submitted by the Healy-Tibbitts Construction Co., in the sum of \$92,254. These two bids were the lowest bids submitted. Upon an examination of the bid of John Daniel you state, it was discovered that Daniel had omitted to make in due form the affidavit provided for in Sec. 16, Chap. II, Art. VI of the Charter and that therefore his bid was rejected from consideration. On the 12th day of June, 1911, the day on which the bids were opened, the Board passed a resolution rejecting all bids for the work to be done. On July 14th, 1911, your Board passed a resolution rescinding its former action in rejecting all the bids and thereupon and on said day passed another resolution awarding the contract to Healy-Tibbitts Construction Co., for said work. You desire to be advised whether or not your Board acted within the scope of its powers under the Charter in awarding the contract.

Opinion.

Upon the opening of the bids on July 12th, 1911, the Board of Public Works had the power to reject any and all bids or to award the contract to the lowest regular bidder. (See Sec. 17, Art. VI, Ch. I of the Charter.) John Daniel having failed to comply with the necessary requirements in the form of his bid the Board was bound to reject the same for the reason

that it was not a regular bid. On December 27th, 1909, I advised you that a bid which failed to contain the affidavit required by the Charter could not be considered by the Board of Public Works. That opinion was given with reference to a bid submitted by Hansboro Bros. Co. The bid of John Daniel therefore not being a regular bid the Board could utterly disregard it and proceed to award the contract to the lowest bidder submitting a regular bid, or the Board could reject all the bids submitted and readvertise anew.

Having taken one action, however, did not prevent the Board thereafter reconsidering its action so long as no rights were affected by the reconsideration. It is well settled law that where the action or decision of a board, such as the Board of Supervisors, or some other similar body, is done or made in pursuance of notice which the law requires, and is, in its nature, such as to adjudicate upon or determine or affect the substantial personal or property rights of those notified, a decision when rendered cannot ordinarily be rescinded or set aside. In such cases the original adjudication or determination of the board exhausts the board's jurisdiction. This rule, however, does not have application to matters of a merely administrative or legislative character. In such matters the Board may modify, repeal or reconsider its action provided that the vested rights of others are not effected thereby. The above is a statement of the rule in *Ross vs. Stackhouse*, Ind. 16 N. E. 501. The Court in that case said:

“The right to reconsider measures, in pursuance of rules adopted for its government, inheres in every body possessed of legislative power; and unless such right be exercised unreasonably and for fraudulent purpose, to the injury of the complaining party courts cannot interfere.”

The Board, in the first instance, had the power to award the contract to the Healy-Tibbitts Construction Co., for the reason that that company was the lowest regular bidder. A reconsideration of its determination to reject all bids and readvertise anew for bids could not affect the personal rights or property of any one. The action that the Board should

take in the first instance, namely, whether it should reject all the bids or accept the Healy-Tibbitts Construction Company's bid was administrative and, as above stated, the Board had the right on July 14th to reconsider its action and make the award to the Healy-Tibbitts Construction Co., such award having been made to the lowest regular bidder within twenty days after the opening of the bids in conformity with Sec. 17, Art. VI, Chap. I of the Charter.

I therefore advise you that the Board acted within its power in reconsidering its action and that on July 14th it had the power to either accept the bid of the Healy-Tibbitts Construction Co., or reject all bids and readvertise anew. The course that the Board should pursue is a matter for the determination of the Board and upon which it is not within my province to advise you.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

**Tenement House Law—Even Buffet Kitchens and Pantries
Must Have a Window Opening Upon a Yard, Street or
Court.**

July 31st, 1911.

Gentlemen: I am in receipt of your request of June 24th, requesting me to advise you whether or not a group of buffet kitchens in a tenement house may open upon a court of lesser dimensions than those specified for bedrooms in the State Tenement House Law passed by the last Legislature.

Opinion.

Section 18 of the Act provides:

“In every tenement house hereafter erected every room, except water-closet compartments and bath rooms shall have at least one window opening directly upon the street, or upon

a yard or court of the dimensions specified in sections 8 to 16 of this Act, and such windows shall be located as to properly light all portions of such rooms."

Section 20 provides as follows:

"In every tenement house hereafter erected, all rooms, except water-closet compartments and bath rooms, shall be of the following dimensions: In each apartment there shall be at least one room containing not less than one hundred and twenty square feet of floor area, and each other room shall contain at least ninety square feet of floor area. Each room shall be in every part not less than nine feet from the finished floor to the finished ceiling; provided, that an attic room need be but nine feet high in but half of its area. Except that small closets and water-closet compartments, and bath rooms, may be not less than seven feet six inches in height and except that buffet kitchens or pantries may be less than ninety square feet of area; provided, that same are not occupied or intended or designed to be occupied as bed rooms."

These are the only provisions of the Act which have any bearing upon the question. Section 18 is specific that all rooms of a tenement house excepting water-closet compartments and bath rooms shall open upon a yard or court of the dimensions specified in Sections 8 to 16. Section 18 deals solely with the requirement that rooms in a tenement house shall open upon a court or yard or street. Section 20 deals solely with the dimensions of rooms of a tenement house and the height of ceilings. Small closets and water-closet compartments and bath rooms may by terms of this section be less than the required height of other rooms and buffet kitchens or pantries may have less floor dimensions. The exception of Section 20 with reference to buffet kitchens or pantries goes solely to the floor area. The exception does not refer back to any other requirement or condition specified in the Act and therefore cannot be read as to imply any exception to the terms of Section 18.

There is an apparent hardship in requiring that small buffet kitchens or pantries shall be obliged to open upon a court of the size specified in Sections 8 to 16 of the Act, and most probably if the matter had been called to the attention of the Legislature the Legislature would have permitted a buffet kitchen or pantry to open upon a court of lesser dimensions. The statute, however, does not make any distinction in the rooms or sizes of rooms with respect to the requirements of Section 18 that they have at least one window opening upon a court or yard or street with the sole exception of water-closet compartments and bath rooms. Notwithstanding the harshness of the requirement I am unable to construe the statute otherwise than in requiring that even in buffet kitchens and pantries these requirements must be observed. I do not feel justified in advising the Board to disregard the provisions of any statute or ordinance for the reason that the provisions of the ordinance or law may appear to be unreasonable.

I therefore advise you that the State Tenement House Act requires that even buffet kitchens and pantries of lesser dimensions than the ordinary rooms of a tenement house must have at least a window opening upon a street, yard or court as required by Section 20 of the Tenement House Act.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Sailors' Home the Property of the City.—No Attempt is Being Made by the Government of the United States to Sell the Same.—Status of this Property.

August 3rd, 1911.

Gentlemen: I am in receipt of your communication of the 1st inst. as follows:

“The attention of the Board of Supervisors has been called

by the lessee of the Sailors' Protective Society to the fact that the property known as the Sailor's Home is to be sold by the United States Government.

The Board of Supervisors wishes to be advised whether or not the Federal Government has the right to sell the property known as the Sailor's Home, situate on the northwest corner of Harrison and Spear Streets, which premises are more particularly described as follows, to-wit:

'Commencing at the northwest corner of Harrison and Spear streets, and running westerly on Harrison street 275 feet to Main street, by 137 feet 6 inches in depth.' "

Opinion.

My investigation of the subject matter embraced in your communication discloses the fact that no attempt is being made and none is contemplated on the part of the Government of the United States or any department thereof, to sell or otherwise dispose of the property situated at the place indicated in your letter, belonging to this City and County.

The order directing the sale of the property of the United States is as follows:

"Treasury Department, Office of the Secretary, Washington, D. C., July 22nd, 1911:—The United States Old Marine Hospital Lots, consisting of two-50-yard lots adjacent to the so-called Sailors' Home on Harrison Street, in the block bounded by Harrison, Spear, Folsom and Main streets, in San Francisco, Cal., will be offered for sale at public auction at 12 o'clock, noon, August 21, 1911, in front of said property. Terms cash (as required by law); no bid less than \$165,000 will be considered. The highest bidder must deposit with the auctioneer on the day of the sale a certified check drawn to the order of the Treasurer of the United States for \$5000, as a guarantee of good faith; the proceeds of this check to be forfeited to the United States in case of the bidder's default. The balance of the purchase money must be paid upon the delivery of the deed. The right is

reserved to the Secretary of the Treasury until September 4th, 1911, to accept or reject the highest bid. For further information apply to the Collector of Customs, San Francisco, Cal. J. F. CURTIS, Acting Secretary of the Treasury."

The two 50-vara lots referred to in the above order lie to the northwest of the property belonging to this City and County.

In order to acquaint your Honorable Board with the status of the property owned by this City and County and occupied and used for a Sailors' Home by the Sailors' Protective Relief Society, under and by virtue of a lease for five years, made by the Mayor in accordance with Ordinance 1184, approved June 1st, 1911, I will give a brief summary of the incidents affecting the title thereto.

The City of San Francisco adopted Ordinance No. 280, which is as follows:

"For Conveying certain lots to the Government of the United States.

The People of the City of San Francisco do ordain as follows:

That His Honor the Mayor, be directed to convey, on their behalf, all their right, title and interest to certain six fifty vara lots, bounded and described as follows: on the east by Spear street, on the south by Harrison street, on the west by Front street, and north by the Beach—the whole comprehended within an area of one hundred varas by one hundred and fifty varas.

J. P. Hanen, President of the Board of Aldermen.

James De Long, President of Board of Asst. Aldermen.

Approved December 10th, 1852.

C. J. Brenham, Mayor."

On December 11, 1852, Mayor Charles J. Brenham, in accordance with said ordinance No. 280 made a deed of the property therein mentioned to the United States. On August 11, 1876, the Congress of the United States passed the following Act:

“Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all the right and title of the United States to the following described property is hereby relinquished to the City and County of San Francisco; the same being the two hundred and fifty vara lots, on which the Old Marine Hospital Building now stands, fronting 275 feet on the north side of Harrison street, between Spear and Main streets, with a uniform depth of 137 feet six inches, as laid down on the official map of the said City to be used by the City and County of San Francisco solely for the purpose of a Sailors’ Home, provided that if the same shall at any time be used for any other purpose aforesaid or if said Home shall not be opened within one year from the passage of this Act, in each such case all right and title hereby relinquished shall revert back to and again in the United States. Approved August 11th, 1876.”

The title to the property relinquished by the United States Government was accepted by Resolution No. 9925 (New Series).

The City and County of San Francisco has fully complied with all the terms and conditions imposed upon it by the above Act pertaining to the opening of the Sailors’ Home within the period of one year from the passage of the Act and the continuous and uninterrupted use of the land for that purpose. Having complied and now complying therewith, the title to said property cannot be divested from this City and County.

The transfer of the title from the City to the United States under the deed authorized by Ordinance No. 280, was involved in the case of Hubbard vs. Sullivan, 18 Cal., page 508, which was an action in ejectment brought by squatters against persons holding possession of the land as agents and employes by the Government. The Supreme Court confirmed the possession of the United States under the deed but “purposely waived a decision upon the question of the title of the United States under the deed or the Van Ness Ordinance for the reason that the City is not a party to the record and it is

not necessary to a final disposition of the plaintiff's claim to pass upon the questions."

You are advised that, inasmuch as no attempt is being made by the United States Government to sell the property occupied by the Sailors' Home, no rights of the City and County are being invaded.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Contractors Under Board of Works Having Failed to Comply with their Obligations, no Ordinance or Resolution by the Board of Supervisors is Necessary to Enable Board of Works to Rescind.

August 21st, 1911.

Dear Sir: I am in receipt of your communication of August 10th, 1911, requesting my opinion on the following matter:

"The Board of Public Works finds it necessary to rescind and set aside the granting of certain contracts for public work in connection with which contracts the persons dealing with the city and entering into the same have failed to perform obligations assumed by them. The Board of Supervisors, by resolution, has in each instance authorized the Board of Public Works to enter into these contracts, at the same time setting aside and making available money for the same. The question now arising is whether the Board of Supervisors can authorize the Board of Public Works to rescind and set aside such contracts merely by passing a resolution to that effect, or whether it is necessary that an ordinance be adopted upon the subject."

Section 14, Article VI, Chapter I of the Charter provides that all public work authorized by the Supervisors to be done under the supervision of the Board of Public Works shall, un-

less otherwise determined by the Board of Public Works, be done under written contract.

Section 14 and subsequent sections of Article VI of Chapter I, lay down the procedure to be followed by the Board of Public Works in the letting of contracts.

Section 19 provides that in case of improvement of streets the owners of the major portion of the frontage of lots and land upon the street whereupon the work is to be done, or which are liable to be assessed for such work, or, in case of an assessment district, the owners of the major portion of the superficial area embraced in such district, or their agents, shall not be required to present sealed proposals but may, upon making oath that they are such owners or the agents of such owners, within ten days after the first posting of said award, elect to take such work and enter into written contract to do the whole work at the price at which the same has been awarded.

Section 20 of the same chapter and article provides as follows:

“If the owners or contractor who may have entered into any contract do not complete the same within the time limited in the contract, or within such further time as is hereinafter provided, the Board may relet the unfinished portion of said work in accordance with the provisions in this chapter prescribed for the letting of the whole.”

In Section 21 it is declared that “in case of failure on the part of the contractor to complete his contract within the time fixed in the contract or within such extension of said time as is herein provided, his contract shall be void and the Supervisors shall not, therefore, pay or allow to him any further compensation for any work done by him under such contract.”

Under the provisions of the charter above referred to the Board of Supervisors in the first instance legislatively declares that certain work shall be done by the City and that the public moneys of the City shall be expended therefor. The

Board thereupon authorizes the work to be done under the supervision and control of the Board of Public Works. The Charter then works automatically as to the mode or procedure to be followed by the Board of Public Works.

The Board of Supervisors does not award or enter into a contract with any contractor nor does the Board approve any contract entered into by the Board of Public Works. That matter is entirely controlled by provisions of the Charter. The Board of Supervisors, in deciding that public work shall be done, merely directs and authorizes the Board of Public Works to do the same.

When a contract has been let by the Board of Public Works and the contractor fails to complete his contract, the authority conferred upon the Board of Public Works to do the work has not been rescinded or made void by the failure of the contractor. The authority and duty of the Board of Public Works to complete the work still exists by reason of the original authority conferred upon the Board of Public Works by the Board of Supervisors.

In the absence of express direction in the Charter to the Board of Public Works to enter into a new contract, I would be of the opinion that the Board of Public Works had the authority nevertheless to enter into a new contract for the completion of the work for the reason that the doing of the work is placed by the Charter under the control and supervision of the Board of Public Works.

Section 20 of Article VI of Chapter I, above referred to, however, expressly provides that in case a contractor does not complete his contract the Board of Public Works may relet the unfinished portion of said work in accordance with the provisions of that chapter prescribed for the letting of the whole. The direction of the Charter in this respect is complete and does not require any affirmative action on the part of the Board of Supervisors. Section 20 refers to any contract mentioned in Article VI of Chapter I and applies not only to contracts of general nature but also to contracts for the improvement of streets where the owners have, in accordance with Section 19, entered into the contracts.

In view of the foregoing I am of the opinion that neither an ordinance, nor a resolution for that matter, is necessary to confer authority upon the Board of Public Works to enter into a contract to do work which has been left unfinished by a contractor who has failed to complete his work. It is not improper for the Board of Supervisors to pass a resolution declaring the forfeiture of the bond of a contractor who has failed in his contract for the reason that, although a contractor and his sureties become liable upon the bond immediately upon the breach of the contract by operation of law, nevertheless, it is proper for the Board of Supervisors to call the attention of the officials and departments of the City and County of San Francisco to that breach which can be done by resolution. The resolution has no further effect or purpose than declaring that a breach has occurred and that the City will proceed to assert the rights which it has in the premises and calling the attention of the proper officials and departments to those facts.

Respectfully,

PERCY V. LONG,

City Attorney.

Mayor.

China and Central Basins—The Conditional Grant of these Basins to the City was Revoked by the Statute of March 15th, 1878.

August 16th, 1911.

Gentlemen: I am in receipt of Resolution No. 6948 (N. S.) as follows:

WHEREAS, The attention of the members of this Board has been unofficially directed to a claim of ownership in the city of those particular portions of the city front lands officially known and designated as China and Central Basins; and, it being a matter of municipal concern, in view of such claims, that the question of the city's title thereto be speedily determined; now therefore be it

Resolved, That the City Attorney be and is hereby requested to immediately institute a thorough search of title to said lands, and to take such legal measures to protect the rights of the city therein and thereto, if any such be found to exist, as he may deem expedient.

Opinion.

I shall take up the matters inquired of separately and first advise you of the status of the title to what is known as "Central Basin".

A careful examination of the records of the City and County of San Francisco discloses no conveyances of any portion of the land within the lines of said Basin by the State of California, except that a block of land extending easterly into the waters of the Bay from Illinois street and known on the official map of the City and County of San Francisco as Potrero Nuevo Block No. 422 was conveyed by the Board of Tide Land Commissioners on behalf of the State of California to I. W. Raymond by deed dated November 17th, 1871, and recorded January 13, 1875, in Liber 772 of Deeds at page 1. Also the adjoining block of land lying to the south of said Block No. 442 and known and designated on said official map as Potrero Nuevo Block No. 423, was conveyed by said Tide Land Commissioners to Patrick Tiernan by deed dated November 17th, 1871, and recorded January 18th, 1875, in Liber 810 of Deeds at page 236. The State title to these two blocks merged in the Pacific Steam Whaling Company, a corporation, together with any title to the uplands therein and finally by various mesne conveyances vested in the Union Oil Company of California, a corporation.

On March 29th, 1909, a suit under the Act of June 16th, 1906, commonly called the "McEnerney Act" by the Union Oil Company of California against all Persons claiming interest, etc. (Superior Court, Special No. 15371) to establish its title to the blocks of land above described. In this suit the City and County of San Francisco was made a party and appeared and is concluded by the judgment rendered therein on

July 6th, 1909, whereby plaintiff's title was established to be the fee, simple absolute free from any claim of interest on the part of said City and County of San Francisco or any other adverse claimants except The German Savings and Loan Society, a corporation, as mortgagee. A certified copy of the decree establishing plaintiff's title was recorded in the office of the County Recorder of the City and County of San Francisco on July 6th, 1909, in Liber 311 of Deeds, New Series, at page 253.

Under that certain act of the Legislature of the State of California entitled an "Act to vacate certain streets, etc." approved March 30th, 1872, certain salt marsh and tide lands including Central Basin were granted to the City and County of San Francisco, "with full power to **regulate, manage, control** and donate or dispose of the same, by ordinance, for railroad and other commercial purposes * * * on this express condition, to-wit: That any lands donated under authority of this act to any railroad company shall revert again to the State of California, if at any time such railroad shall cease to use for terminal purposes, the lands granted to it". The records fail to show that the municipality exercised any of the powers granted thereunder. This Act was amended March 11th, 1874 (Statutes 1873-4, page 359) by withdrawing from the City the power of alienation, and so much of the act as gave the city control of Central and China basins was repealed on March 15th, 1878 (Statutes 1877-8, page 263).

The first Act mentioned was a grant to the City upon a condition subsequent that the City's control should be for railroad and other commercial purposes only, which was never exercised before the repeal.

That the grant by the State to this City and County was only conditional and not an absolute conveyance is evidenced by the wording of the Act itself. Therein the City is merely given the right, in the nature of a trust, to regulate, manage, control and donate or dispose of said land **by ordinance** for railroad or other commercial purposes. A mere

reading of the Act itself leads to the conclusion that the Legislature did not intend to, and in fact did not, make an absolute grant of said lands to the City and County of San Francisco.

Even though the City complied with all the conditions imposed by the Act, the result of such compliance would be that the title, conditionally granted to it, would, on the enactment of the ordinance, be passed to whatever railroad company was mentioned in the ordinance, and under such circumstances the City and County of San Francisco would not have or retain any title thereto; not having complied therewith, the City cannot take the position that such non-compliance operates to vest in it a title that was designed under the Act to be but of a temporary and fleeting character.

I will not pass upon the question as to whether or not, the City could, at this time, avail itself of the power granted for the reason that the Legislature, as shown above, revoked the grant by a subsequent act before the City made acceptance and it would be a moot question, in view of the decision of the Supreme Court in the case of *People vs. Williams*.

The purpose of the Legislature in designating the City and County of San Francisco the instrument and agent of the State to convey said land to a railroad company seems to be plain. The City and County would occupy a better position to deal with the railroad company than the Legislature because the Legislature adjourned two days following the passage of the Act, and there was no opportunity to settle all the questions which would necessarily arise in connection with such a valuable grant. Therefore, in order to expedite said grant to the railroad company the Legislature adopted the expedient of conferring upon the City the same right the State possessed of making the grant and enabling the railroad company to occupy said lands for terminal purposes, immediately upon the adoption of the necessary ordinances by the City.

The Act provides that "the grant herein made to the City and County of San Francisco for the **purposes specified**, is

on this **express condition**, to-wit, that any lands donated under authority of this Act to any railroad company shall revert again to the State of California, if at any time such railroad shall cease to use, for terminal purposes, the lands granted to it.

So that here we are met by the uncompromising language employed imposing two conditions: the first, that the City exercise the powers granted to it for specific purposes, i. e. to donate or dispose of the land to railroad companies by ordinance, and, second, that having acquired the land by ordinance for terminal purposes the railroad companies use the same for said purposes continuously thereafter.

Non-compliance with the condition imposed by the Act on the railroad company operates, automatically, to revert the title in said lands in the State.

It nowhere appears that the City and County of San Francisco ever complied with the terms of the Act of March 30th, 1872, by the enactment of an ordinance or ordinances granting to any railroad company the lands covered by the waters in said basin.

The important question remaining is whether or not the State of California, after making the conditional grant to the City and County of San Francisco of Central Basin under the Act of March 30th, 1872, had the power to revoke the same and assume jurisdiction and control thereof by the repeal of said Act. This question has been decided adversely to this City and County by the Supreme Court in the case of *People vs. Williams*, 64 Cal. 498.

This was an action involving Channel Street. On April 1, 1872, the Legislature declared certain portions of Channel Street dedicated to be an open canal for the purpose of drainage and navigation, across which the Supervisors of the City and County were empowered "to extend the streets abutting upon Channel Street and the said canal upon drawbridges which would not obstruct the navigation of the canal; to keep the canal dredged to such a depth that the water therein shall be two feet deep at the lowest tide and to construct a bulk-

head upon and along both sides of the canal, and for that purpose to condemn private property lying on either side of Channel Street on the canal." (Sections 1, 2, 3 and 4, Statutes 1871-72, page 926.)

The Court used the following language, on pages 501 et seq.:

"Upon this last statute the defendant makes his contention that Channel Street and its appurtenances were placed by the State under the jurisdiction of the City and County of San Francisco, and that the State retained no jurisdiction over it.

Conceding that the State had the right to dedicate to the City a portion of the navigable waters of the harbor for the purpose of deepening, improving and preserving the same, and for the regulation of vessels and wharves therein, and to surrender its right to control and regulate them, the statute relied on did not, *per se*, operate as a dedication or a surrender. It contained a mere offer to dedicate a portion of Channel Street and a portion of Mission Creek as an open canal, if the City would deepen and improve it as the Legislature prescribed. But it was for the City to accept the offer and complete the improvements. If it did not, the dedication was not complete. The passage of an ordinance setting apart and dedicating a portion of the water front in a harbor for public use as a free public dock for ships is, said the late Supreme Court, a mere offer to dedicate, and the dedication is not complete, nor does the public acquire any right to the easement, until it has been accepted and used by the public in the manner intended. (The City and County of San Francisco vs. Calderwood, 31 Cal., 586; Same vs. Canavan, 42 Cal., 541.)

The City did not accept the offer made by the statute of 1871-72, and the improvements were not made. Under these circumstances the State had the right to recall its offer in whole or in part, and to deal with the subject of it in the exercise of its sovereign powers. As part of the water highway of the State, the proposed canal and the streets connected with it were subject at any time to the exercise of those powers (Polack vs. Trustees, etc., 48 Cal., 491); and on

March 27, 1874, the Legislature of the State vacated a portion of Channel Street (Sec. 3, Stats. 1873-74, p. 711); and afterwards, on February 28, 1876, placed Channel Street, as far west as Fifth Street, under the jurisdiction of the Board of State Harbor Commissioners. (Sec. 2524, Pol. Code; see also Sec. 4, Stats. 1877-78, p. 263.)''

The doctrine enunciated in said case is absolutely determinative of the question of the right of the State to revoke a grant of this character at any time before its acceptance.

The foregoing conclusions apply with equal force to the lands covered by China Basin. I note, with reference to China Basin, that on the 21st day of November, 1901, the Harbor Commissioners entered into a lease with the San Joaquin Valley Railway Company, covering the lands within said Basin, which lease was ratified by the Legislature on March 23, 1901.

You are advised:

1st. That the Act of March 30, 1872, was a conditional grant to the City and County of San Francisco of China and Central Basins.

2nd. That this City and County did not comply with the terms of said Act, nor accept the grant therein made.

3rd. That the State of California, by the Act of March 15, 1878 (Stats. 1877-78, p. 263), revoked said grant.

4th. That the State had the right, under the authority cited, to recall its offer and to revoke the grant so made before its acceptance by the City.

5th. That the City and County of San Francisco has no right or title in or to said China and Central Basins or any part or portion thereof.

Respectfully,

PERCY V. LONG,
City Attorney,

Board of Supervisors.

**Certain Members of the Fire Department Having Resigned,
Under the Facts Stated Their Resignations May Be
Withdrawn and the Men Reinstated. Certain Reinstatements Invalid.**

September 8th, 1911.

Dear Sir: I am in receipt of your letter of September 6, 1911, wherein you ask to be advised as to the legality of the appointments of four members of the Fire Department, to-wit: F. Flageolet, W. J. Collins, W. D. Carey and H. Donnadieu.

Upon an examination of the report of the Board of Fire Commissioners made to the Grand Jury on July 19, 1911, I find that F. Flageolet resigned on January 21, 1907, while the charge of leaving quarters without permission was pending against him. The report does not show that these charges were formally made or set for trial, but it appears that the resignation was accepted in lieu of a hearing upon the charges. The report also shows that he was reinstated on April 21, 1910, after the resignation had been withdrawn by permission of the Fire Commission. If these facts are correct his reinstatement was invalid.

The same report shows that W. J. Collins resigned on December 21, 1906, and a copy of the petition for reinstatement which is attached to the report shows that the resignation was voluntary and not made under duress. Such being the case, his reinstatement is also invalid.

From the facts which appear from this report and the respective petitions for reinstatement, the resignations of W. D. Carey and H. Donnadieu were tendered under circumstances similar to that of Thomas Howe. Assuming that the facts as stated are true, it was proper for the Fire Commission to permit the withdrawal of the resignations and order the men reinstated in the Department.

I enclose herewith copy of opinion this day forwarded

to the Grand Jury regarding the status of various members of the Fire and Police Departments.

Respectfully,

PERCY V. LONG,
City Attorney.

Treasurer.

Under the Facts Stated Certain Resignations in the Police and Fire Departments are Voluntary and May not be Withdrawn. Coerced Resignations, Men May be Re-instated.

September 8th, 1911.

Gentlemen: I am in receipt of your communication of September 1st, 1911, enclosing reports of the Board of Police and Fire Commissioners regarding the reinstatement of various officers in their respective departments, and recommending that legal proceedings be instituted in the name of the City and County of San Francisco against Auditor Thomas F. Boyle or Treasurer John E. McDougald, or both.

The reports submitted by the Police and Fire Departments are not full enough to give me the necessary information to enable me to commence the actions you suggest and I have accordingly requested each of these departments to submit the necessary information.

I am able, however, at this time to advise you as follows: That from the facts submitted to me I am of the opinion that the reinstatements of Richard L. Ingham, Frank A. Lyeett, James H. Pearl and Edmund J. Winters were valid. These men having submitted their resignations under circumstances which show coercion on the part of the Police Commission so that the resignations were brought about through such coercion and were not voluntary. If these are the facts their cases come within the rule of the opinion of July 23, 1908. (See opinions of City Attorney Lane, 1908-9, page 152.)

As to the case of Bernard M. Clancey, no facts have been presented and I am compelled to withhold a decision thereon

until I am able to consider the circumstances under which the resignation was offered.

As to the cases of Dauenrheim, Fairweather, McGorty, Rocca and Wren, it appears that all of these men were dismissed from the Department after trial upon charges regularly filed and heard. As to them of course there can be no question that their attempted reinstatement was absolutely void.

As to the cases of Dowd and Manning, it appears that their resignations were presented pending the hearing upon charges which had been regularly filed against them. Such being the case their attempted reinstatement was also void.

As to the case of White whose resignation was presented January 27, 1901, you are advised that whatever the circumstances surrounding the tendering of such resignation, his continued acquiescence for a period of more than three years constitutes a waiver of any claim for reinstatement. (See *Harby v. Board of Education*, 2 Cal. App. 418.)

As to the members of the Fire Department listed in your report I find the following:

That John Cauley, H. A. Higgins, John Haley, M. J. Dolan and Anton Swanburg were all dismissed from the Department upon charges regularly filed and that as to them the attempted reinstatement was in each case invalid.

Assuming that the facts presented in the report of the Fire Commissioners to your body and in the petitions for reinstatement accompanying the same are correct I find that the resignation of Thomas Howe, W. D. Carey and H. J. Donnadiou were brought about by coercion on the part of the Department and that the reinstatement of these men was in each case proper.

I find that the resignation of E. A. Richardson was presented in 1902, and that the petition for reinstatement was filed April 18, 1910. His attempted reinstatement was void for the same reasons as stated above in the case of W. V. White.

I find that in the case of F. Flageolet his resignation was presented while charges were pending against him and accordingly his attempted reinstatement was invalid.

From the facts presented it appears that the resignation of W. T. Collins and Joseph Barskey were voluntary and not made under duress. Their attempted reinstatement was therefore invalid.

In the case of Daniel O'Dell, G. H. S. Peters and P. P. Pyritz there are no facts sufficient to enable me to pass upon the legality of their reinstatement and until such facts appear it is impossible for me to advise the Auditor as to the legality of their demands.

The foregoing presents four different cases under which a member of the classified service of the City and County may sever his connection with the Department in which he is employed and these will be considered separately:

1. Voluntary Resignation. Where a member of the classified service tenders his resignation voluntarily and such resignation is accepted, there is no power in the officer or department to set aside the order accepting such resignation or to give leave for the withdrawal thereof. (See opinions of City Attorney Lane 1899-1902, page 566.)

2. Involuntary Resignation. Where a member of the classified service has tendered his resignation under circumstances which show coercion on the part of the appointing officer, he may, upon a proper showing of the facts, withdraw such resignation and be restored to the position which he formerly held. (See opinions of City Attorney 1908-09, page 152.)

3. Resignation pending charges. Where a member of the classified service has been cited to appear for trial upon charges regularly filed and chooses to resign his position rather than stand trial upon such charges, such resignation is wholly voluntary and is not made under duress or coercion and may not be withdrawn.

4. Dismissal. Where a member of the classified service has been dismissed upon charges regularly filed and heard he is not entitled to reinstatement. When the judgment of dismissal is entered by the Board or Commission conducting the trial such judgment becomes final and cannot be made subject

to a rehearing or review by the same or a subsequent board. The only remedy which the person has in such a case is to apply to the Court for a review of the trial upon the grounds that the body conducting the trial has exceeded its jurisdiction. (See opinions of City Attorney Lane, 1899-02, page 323; U. S. v. Gorson, 114 U. S., 622; Cook v. Civil Service Commission, Cal. Supreme Court decided August 24, 1911, decision on motion to dismiss appeal.)

Respectfully,

PERCY V. LONG,
City Attorney.

Grand Jury.

Bids for Leasing of Realty—When the Bid of the Lowest Bidder does not Substantially Meet the Requirements of the Specifications, Board May Reject the Bid, etc.

September 13th, 1911.

Gentlemen: I am in receipt of your communication requesting me to advise you with reference to certain bids for the leasing of school property on the southeast corner of Bush and Stockton Streets. It appears from your communication that the Board of Education called for bids for the leasing of that property on April 3, 1911. The specifications for the bids required, among other things, that "all bids should state the rental which the bidder or bidders will pay for the above described property during the entire term of thirty-five years; provided, however, that said rental must be segregated into two amounts, the first of which amount shall be the rental to be paid for the first five years, which rental must be at least six (6) per centum of the total aggregate rental bid for the entire term of the lease, and shall be payable in equal monthly installments during said five years; and the second of which amount shall be the rental to be paid for the remaining thirty (30) years of the lease, which rental for said thirty (30) years shall be payable in equal monthly installments."

In response to the advertisement one Lars C. Larsen submitted a bid in which he agreed to lease the property for thirty-five years as per the advertisement and pay for the first five years the total sum of \$8,000 and for the following thirty years the sum of \$72,360.00 and further agreed to follow all the instructions given in the advertisement.

Another bid was received from the Sutter Street Realty Company. That Company agreed to lease the property for thirty-five years and offered to pay for such lease the sum of \$178,500 payable in the manner following:

“1. For the first five (5) years the sum of (\$10,710.00), that amount being 6% of the total amount bid for the entire term of 35 years; the said sum of \$10,710.00 to be paid in equal monthly installments of \$178.50 per month, and the first installment of rent to be paid six (6) months from and after the date of execution of a lease to me by your Honorable Board;

2. For the second five (5) years of said term the sum of \$10,710.00, to be paid in equal monthly installments of \$178.50 per month.

3. For the next fifteen (15) years of said term the sum of \$54,000.00, to be paid in equal monthly installments of \$300.00 per month.

4. For the remaining ten (10) years of said term the sum of \$103,080.00, to be paid in equal monthly installments of \$859.00 per month.”

A protest has been filed by Lars C. Larsen against the awarding of the lease to the Sutter Street Realty Company. Section 1, Subdivision 11, Chapter III, Article VII of the Charter confers upon the Board of Education the power to lease to the highest responsible bidder for the benefit of the common school fund, for a term not to exceed thirty-five years, any real property of the School Department not required for school purposes. The section further provides, however, that no lease shall be made excepting after advertising for bids for at least sixty days in the official newspaper and in one other daily

newspaper in general circulation published in the City and County.

The section quoted does not lay down further than this the method to be adopted in the leasing of school property. The advertisement published by the Board of Education calling for bids for the property in question stated "No bid will be considered unless the terms and conditions thereof are in accordance with these specifications." While, as pointed out Section 1, Subdivision 11, Chapter III, Article VII of the Charter does not lay down a method to be followed by the Board of Education in leasing school property, I am convinced, however, that the Board, being required to lease school property only after competitive bidding, had the power and right to require that all bidders in submitting bids should fully comply with the specifications of the Board. That is the rule laid down in the Charter with respect to all other competitive bidding. The reason, therefore, is obvious. If a bidder is allowed to deviate from the specifications, free and competitive bidding would be destroyed and specifications would be useless. The object to be obtained by requiring that all bidders shall fully comply with the specifications is to place all bidders upon an equality.

An examination of the bid of the Sutter Street Realty Company shows that it did not comply with the specifications of the Board of Education for the reason that the second installment of rental for the last thirty years of the lease was not to be paid by the bidder in equal monthly installments. On the contrary the Sutter Street Realty Company, in their proposal, proposed to pay the greater portion of the entire rental during the last ten years of the lease.

In effect, then, the Sutter Street Realty Company did not submit a bid to lease the property in question and pay the segregated amounts in equal monthly installments. The specifications declared that one of the conditions of the lease was to be a stipulation that the rental should be paid in equal monthly installments. The Sutter Street Realty Company did not offer to enter into such a lease. As stated, *supra*, the

specifications declared that no bid would be considered unless the terms and conditions thereof accorded with the specifications. If the express declaration then of the specifications is to be followed the bid of the Sutter Street Realty Company is not to be considered.

Can the Board now waive the requirements as to the segregation of the rental in monthly installments and thus avoid the direct result declared by the Board itself to follow upon failure of a bidder to meet the requirement? I am of the opinion that the Board cannot. It is true that immaterial and unsubstantial variations in the requirements of the specifications calling for bids may be waived when the requirements were not made in compliance with a statute, ordinance or other law. It is also true that a Board having general authority to enter into a contract may waive requirements which the Board voluntarily made in its invitation for bids.

The Board of Education, however, has power to lease school property only after having advertised for bids in a certain way. Competitive bidding being required, the Board, it seems to me, must be bound by the terms and conditions which the Board, pursuant to the Charter, fixes as the terms and conditions of the competition. If the Board, after bids have been received and opened, may waive a material and substantial requirement, a condition on its power to lease school property has been violated, namely, competitive bidding. Competitive bidding denotes, first, fixed terms and conditions, and, second, equality. Unless both are present you do not have the essential qualities of competitive bidding.

It has been further urged that the following statement in the specifications may have some bearing upon the question: "All persons are hereby invited to present to the said Board of Education, not later than the day and hour above mentioned, their sealed bids or proposals for the granting or awarding unto them of said lease, each bid to be accompanied by a certified check payable to the order of the said Board of Education in the sum of Five Hundred (\$500) Dollars as a guarantee of good faith, so that if the bid of such person or persons be ac-

cepted, that such person or persons will forthwith proceed to accept and will accept from the Board of Education a lease of said property *upon the terms and conditions in the successful bid of such person or persons contained.*” It is urged that the clause would permit the bidder to name his own terms and conditions. There follows after this sentence, however, certain terms and conditions which *must* be inserted in the lease. The clause quoted is modified by what follows to the extent that while the bidder sets forth the terms and conditions of his bid, they must not be inconsistent with the terms and conditions required by the Board to be inserted in the lease. Any other construction of the language would permit the bidder to absolutely dictate to the Board the terms and conditions upon which the property should be leased.

I therefore advise you that in my opinion the bid of the Sutter Street Realty Company does not substantially meet the requirements of the specifications and that it is within the power of the Board of Education to reject the same and deal with the matter as if the Sutter Street Realty Company had never made a bid. The Board could then, if it so desired, award the contract to Mr. Larsen, the lowest regular bidder for the lease, or the Board could reject all the bids and readvertise anew. Whether your Board should accept the bid of Mr. Larsen or readvertise anew is a matter wholly for your determination and discretion.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Education.

**Under the Facts Stated the Restoration of Certain Members
of the Fire and Police Departments are Held to be Valid
—Others Invalid.**

September 14th, 1911.

Gentlemen: In my report to you dated September 8th, 1911, relating to the status of certain members of the Fire and

Police Departments of this City I stated that the name of Bernard M. Clancy, a member of the Police Department, was withheld for further examination. Upon the facts of record, as submitted by the Secretary of the Police Commission, I find that Clancy's case comes within the rule of the Esola opinion and that his restoration to the Department was valid.

I also withheld for examination the names of G. H. S. Peters, Daniel O'Dell and P. P. Pyritz, members of the Fire Department. Upon the facts, as submitted by the Chief Engineer of the Fire Department, I find that the restoration of G. H. S. Peters was valid and that the attempted restoration of Daniel O'Dell and P. P. Pyritz was invalid.

In the same report I stated that from the facts then before me it appeared that the resignation of Joseph Barskey had been voluntary and that if such were the case his restoration was invalid. Upon further examination of the facts surrounding this resignation as submitted by the Fire Commissioners, I now find that said resignation was not voluntary and that accordingly his restoration to rank in the Department was proper.

Respectfully,

PERCY V. LONG,

City Attorney.

Grand Jury.

**Form of Certain Bonds Not in Accordance with the Charter.
Another Form Recommended.**

September 28th, 1911.

Dear Sir: I am in receipt of your communication enclosing bonds which had been submitted to you by the Hon. John E. McDougald, Treasurer of this City and County, issued by the Essex Insurance Company Limited, and the Essex and Suffolk Equitable Insurance Society, Ltd., as bonds to be filed by the Treasurer in the matter of the filing of additional bonds by the said Treasurer because of the insufficiency of certain sureties on bonds filed by said Treasurer.

You ask my opinion with reference to the proper form of these bonds. An examination of them shows that they are foreign bonds drawn in accordance with the law of England with reference to securing an ordinary private employer against the embezzlement of funds, etc., by his employees, rather than such bonds as are required by the law of the State of California in the matter of securing a municipality against any default, etc., upon the part of a public official or his deputies or employees.

The bonds submitted are English bonds and under the law of this State are not valid as sureties on the County Treasurer's bond. Section 955 of the Political Code provides as follows:

"The officer whose duty it is to approve official bonds required of State, County, City and County, or township officers, must not accept or approve any such bond, unless each of the sureties severally justify before an officer authorized to administer oaths, as follows:"

Then follow subdivisions setting forth the method of justification of sureties and subdivision 4 reads as follows:

"4. A corporation, such as is mentioned in section ten hundred and fifty-six of the Code of Civil Procedure of this State, may become and shall be accepted as sole and sufficient surety upon any bond or undertaking authorized or required by the provisions of this code or of any law of this State, subject to the provisions of said section, and those of section ten hundred and fifty-seven of the same code."

In Section 1036 of the Code of Civil Procedure thus referred to we find that it is provided that

"In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of this code, or of any law of this State, any corporation with a paid-up capital of not less than one hundred thousand dollars, *incorporated under the laws of this or any other State of the United States* for the purpose of making, guaranteeing, or

becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the State where it was originally incorporated has such power, and which shall have complied with all the requirements of the law of this State regulating the formation or admission of these corporations to transact such business in this State, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons' sureties;" etc. etc. etc.

We therefore see that a surety company to be lawfully authorized as surety on such official bond as the Treasurer's bond should be "incorporated under the laws of this or any other State of the United States," etc. etc.

These bonds are subject to many criticisms as to their form and I consider it more satisfactory to submit to you the following suggestion for a form of bond for each additional bond to be filed by Treasurer McDougald, properly executed in accordance with our Charter, and the laws of this State, than to indicate the different defects in the form of the bonds submitted. This form which I suggest includes the conditions required by Article XV, Sections 3 and 6 of our Charter and the general laws of this State, which are omitted in the bonds submitted.

I understand that the Aetna Indemnity Company, and the United Surety Company, mentioned in the following Resolution of the Board of Supervisors, are such sureties on the original bonds of the Treasurer.

WHEREAS, John E. McDougald was, at the election held on the day of November, 1909, elected to the office of Treasurer in and for the City and County of San Francisco, State of California, and

WHEREAS, the said John E. McDougald is required by law to file a certain official bond or bonds, and

WHEREAS, the original sureties on the official bonds of said John E. McDougald as said Treasurer were the following, and in the following amounts, as indicated by the amounts set opposite the names of said sureties.

Names of Original Sureties.**Amounts.**

(Names and amounts of all original sureties.)

AND, WHEREAS, it does appear that a Resolution No. 7300 (N. S.) was regularly passed and adopted by the Board of Supervisors of the City and County of San Francisco, on January 30, 1911, and was regularly approved January 31, 1911, of which the following is a true and correct copy, to-wit:

RESOLUTION No. 7300. -(New Series.)

WHEREAS, It appears to the satisfaction of the Board of Supervisors of the City and County of San Francisco, that the bonds of the following officers are insufficient by reason of the incompetency and also by reason of the insufficiency of the Aetna Indemnity Company and United Surety Company, the sureties on said bonds, to-wit: Thomas F. Boyle, Auditor; John E. McDougald, Treasurer; David Bush, Tax Collector; Charles M. Fickert, District Attorney; Thomas O'Dowd, Timothy B. Healy and John L. Herget, Supervisors; now therefore

Resolved, That additional or supplemental bonds be and the same are hereby requested to be filed by the above named officers, and the amounts of said additional and supplemental bonds are hereby fixed and determined as follows:

Thomas F. Boyle, as Auditor, in the sum of \$50,000; John E. McDougald, as Treasurer, in the sum of \$75,000; David Bush, as Tax Collector, in the sum of \$100,000; Charles M. Fickert, as District Attorney, in the sum of \$10,000; Thomas O'Dowd, Timothy B. Healy and John L. Herget, as Supervisors, each in the sum of \$5,000; further,

Resolved, That Resolution No. 7260 (New Series) be and is hereby repealed.

And the Clerk is hereby directed to advertise this Resolution in the Evening Post newspaper.

In Board of Supervisors, San Francisco, January 30, 1911.
Adopted by the following vote:

Ayes—Supervisors Bancroft, Cutten, Deasy, Harris, Hayden, Healy, Herget, Hocks, Kelly, Knowles, Loughery, McLaughlin, Murdock, Nelson, O'Dowd, Pugh, Walsh.

Absent—Supervisor Minehan.

W. R. HAGERTY, Clerk.

Approved, San Francisco, January 31, 1911.

J. A. KELLY,

Acting Mayor and ex-officio President of the Board of Supervisors."

AND, WHEREAS, the aforesaid *Aetna Indemnity* Company and *United Surety* Company, said original sureties on the said official bond of said John E. McDougald, are, each of them, mentioned in the aforesaid Resolution of the said Board of Supervisors as being insufficient and incompetent and disqualified;

AND, WHEREAS, because of said insufficiency, incompetency and disqualification of said sureties, and because of aforesaid Resolution of said Board of Supervisors, the said John E. McDougald does desire to file additional official bonds as said Treasurer, as required by law, which additional bonds are to have as sureties thereon the following, and in the following amounts, as specified by the figures set opposite the names of said sureties.

Names of Additional Sureties.	Amounts.
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(Names and amounts of all additional sureties.)

NOW, THEREFORE, Know all men by these Presents: That we, John E. McDougald of the City and County of San Francisco, as Principal, and the (name of surety) as Surety, are jointly and severally bound and indebted unto the City and County of San Francisco and to the State of California in the sum of \$. lawful money of the United States of America, for the payment of which sum of money well and truly to be made, the parties jointly and severally indebted herein as aforesaid jointly and severally bind them-

selves, their heirs, executors and administrators, successors or assigns firmly by these presents.

Sealed with our seals and dated this.....day of.....
.....in the year of our Lord One Thousand Nine Hundred and Eleven.

The condition of this obligation is such that if the above bonded John E. McDougald, principal, shall well, truly and faithfully perform all official duties that now are or may hereafter be imposed upon or required of him by law, ordinance or the Charter of the City and County of San Francisco, or by law of the State of California, or by any law, and shall, at the expiration of his term of office, surrender to his successor all property, books, papers and documents that may come into his possession as such Treasurer, and further, if all of his deputies, assistants, clerks and employees appointed by him and all and each of them shall faithfully perform all the duties that now are or hereafter may be lawfully imposed or required of them and of any and each of them as such deputies, assistants, clerks or employees, then this obligation to be void, otherwise to remain in full force and effect.

..... (Principal)
..... (Surety)

I return herewith the two bonds submitted.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

Special Election Appropriation is to be Used Exclusively for the Purposes Designated and is Unavailable for Other Purposes.

September 29th, 1911.

Gentlemen: I am in receipt of your communication of September 25th enclosing copy of a resolution adopted by your Board which requests me to advise you whether the Board of

Election Commissioners can draw any warrant against the special election appropriation of \$50,000 contained in the budget of 1911-12 for expenses of the special election on constitutional amendments to be held on October 10th, 1911.

Section 14, Chapter III, Article XI of the Charter provides as follows:

“In the first annual budget to be hereafter adopted by the Board of Supervisors, said Board shall appropriate not less than fifty thousand dollars to be known as the special election fund, to be used exclusively for defraying the cost of verifying petitions and other expenses of special elections initiated by petition of the electorate, including recall elections. In the event of the expenditure of any of said fund, the Board of Supervisors in the next succeeding annual budget shall appropriate a sum sufficient to replete said Special Election Fund.”

This section is plain and explicit in its terms, is mandatory in its direction and when the sum of \$50,000 has been appropriated as therein provided, that sum cannot be used for any other purpose than defraying the cost of verifying petitions and other expenses of special elections initiated by petition of the electorate, including recall elections.

In the budget of 1911-12 there was appropriated to the Department of Elections the sum of \$150,000 “for salaries and expenses” and the sum of \$50,000 “for special elections.” The term “special elections” is comprehensive enough to include the purposes for which the sum of \$50,000 must be set aside as provided in Section 14 of Chapter III of Article XI.

The presumption of law is that officers do their duty and inasmuch as there has been appropriated the sum of \$50,000 in the budget of 1911-12 for special elections the presumption is that that sum was intended for the purposes designated in Section 14 of Chapter III of Article XI. That being so the Board of Election Commissioners cannot draw any warrant against that fund for the expenses of the special election on constitutional amendments to be held October 10, 1911.

If the sum of \$150,000 appropriated in the budget for "salaries and expenses" of the Department of Elections has been exhausted it will be necessary for the Board of Supervisors to provide the expenses of the election to be held October 10th, 1911, on constitutional amendments from some part of the general fund.

It was held in *San Francisco v. Broderick*, 111 Cal. 302, that notwithstanding the amount appropriated to the Department of Elections had been exhausted, nevertheless claims for the holding of elections must be paid out of the general fund of the City. This is upon the theory that the elections are one of the necessities of government and that the expenses therefor must be paid if there is in the Treasury sufficient money to pay the same. The principle established in *City and County of San Francisco v. Broderick* is followed in *People v. Black*, 120 Cal. 553, in *Stevens v. Truman*, 127 Cal. 158, and in the recent case of *Nichols v. Koster*, 157 Cal. 416.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Playground Commission is not a Board Controlling Public Utilities.

October 6th, 1911.

Gentlemen: I am in receipt of your communication of October 4th, wherein you ask to be advised whether the Playground Commission is a board controlling public utilities within the meaning of Sec. 11, Art. XIII of the Charter.

Sec. 11, Art. XIII of the Charter after designating the particular offices and departments subject to the Civil Service provisions of the Charter concludes with the words "and all boards and departments controlling public utilities." This section appears in the original Charter, in effect January 8, 1900, and remains without amendment. At the same time Sec.

1, Art. XII of the Charter provided for the acquisition of public utilities and designated such utilities as "water works, gas works, electric light works, steam, water or electric power works, telephone lines, street railroad, and such other public utilities as the Supervisors or the people by petition to the board may designate." This section was amended Feb. 5, 1903, by the omission of the designation of particular public utilities and by referring to such merely as "any public utility or utilities."

In *Platt vs. City and County*, 158 Cal., p. 74, the Supreme Court of this State held that the object and purpose of the amendment to Sec. 1 of Art. XII of the Charter was to relieve the City Engineer and the Board of Public Works from the duty of having plans, specifications and estimates of the cost and construction of all of the named public utilities drawn up every two years and that it was not the purpose of the amendment to limit the term public utility to water works only. Whether the purpose of the amendment was to broaden the term "public utility" was not decided.

Sec. 11 of Art. XIII, having been prepared and adopted at the same time as the original of Sec. 1, Art. XII, the two must be read together so that the boards and departments controlling public utilities mentioned in Sec. 11, Art. XIII, must refer to boards and departments controlling such public utilities as are designated in Sec. 1, Art. XII.

Art. XIV-a of the Charter providing for the creation of the Playground Commission was inserted by amendment approved Nov. 22, 1907. There is nothing in the article subjecting the appointees of the Playground Commission to the provisions of Art. XIII of the Charter. The Playground Commissioners are given power to have exclusive control of all of the property under their jurisdiction, employ all necessary assistants and employees and fix their duties, authority and compensation and to have exclusive management and disbursement of the funds appropriated to the Commission.

Such being the case I am of the opinion that the Board of Playground Commissioners is not a Board controlling public

utilities as contemplated by the provisions of Article XIII of the Charter and that the appointees of such Board are not subject to such provisions.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

Manner of Making Temporary Appointments in the Classified Civil Service.

October 6th, 1911.

Gentlemen: I am in receipt of your communication of October 4th, containing ten separate queries all relating to the manner and method of making temporary appointments in the classified civil service of this city and county. You detail at length the method pursued by your own and previous boards in the making of these appointments. Without reviewing this method in detail, it is sufficient to say that if the proper procedure has not been followed, the custom of previous boards in adopting an illegal method does not give such method justification.

Section 2 of Article XIII of the Charter provides that the Commissioners shall classify all the places of employment in or under the offices and departments of the city and county mentioned in Section 11 of Article XIII and that such places "so classified by the Commissioners shall constitute the classified civil service of the city and county and no appointment to any such place shall be made except according to the rules hereinafter mentioned."

Section 3 of the same article authorizes the Commissioners to make rules to carry out the purposes of the Civil Service article.

Section 10 of the same article requires the appointing officer to notify the Commissioners of each position to be filled separ-

ately and provides that "to prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commissioners, make temporary appointments to remain in force not to exceed sixty days, and only until regular appointments, under the provisions of this article, can be made."

From the foregoing it is apparent that the first duty of the Commissioners in all cases is to classify the various offices and positions in the classified civil service and that until such positions are so classified no appointments *either temporary or permanent* can be made. That when these positions are so classified they constitute the classified civil service of the city and must include all offices or positions in all of the departments mentioned in Section 11 of Article XIII, excepting such offices or positions as are specially excepted from the operation of that article.

The proper procedure, therefore, in the appointment of temporary employees in any of the departments subject to civil service is this: the appointing power must first notify the Civil Service Commission that a certain position is to be filled and must designate the duties contemplated by such position. The Civil Service Commission must then examine the designation of duties of such position and if that Commission finds that the duties are coextensive with those of another position already classified it is the duty of the Commission to refuse to classify such position and to so notify the appointing power. If, however, the Commission decides at that time that the duties contemplated by the new position are different from those included in any regularly classified position it is then the duty of the Commission to classify such new position and to so notify the appointing power.

In the first case, if no eligibles are available the appointing power is authorized by the Charter to make a temporary appointment not exceeding sixty days or until regular appointments can be made. In the second case, if the new position is so classified and made a part of the classified civil service of the city and county and the position must be filled before ex-

aminations can be held therefor the appointing power is then authorized to make temporary appointments not exceeding sixty days or until such appointments can be regularly made, and no appointment, either temporary or permanent can be made until such circumstances exist.

The Civil Service Commission, having reported that no eligibles are available for the position desired by the appointing power, it is immaterial whether the approval of the temporary appointments is made before the beginning of the month or after. This approval does not go to the extent of designating the particular person entitled to the position. It is in the nature of an authorization to the appointing power to make a temporary appointment upon the ground that no civil service eligible is available.

Answering your queries as they appear in your communication I submit the following:

1. A department under Civil Service, having made temporary appointments to places for which there are no eligibles, and such temporary appointments having been approved by the Commission, has such approval the force of a finding by the Commission that, as a matter of fact, there are no eligibles to fill the temporary places?

Answer. The Civil Service Commission is an administrative and not a judicial body. The approval of temporary appointments has the force of a finding by the Commission that there are no eligibles to fill the temporary places, but this is not a judicial finding and is subject to review in a judicial proceeding. That is to say that if, as a matter of fact, there are civil service eligibles entitled to fill the place which is proposed to be temporarily filled any interested party has the right to insist, by mandamus, that your commission certify him for appointment and that the appointing power make the appointment, which it is required to do under the Charter. (*People v. McWilliams*, 185 N. Y. 94, *Cook v. Civil Service Commrs.* 42 Cal. Dec. p. 230.)

2. If temporary appointments, in the absence of eligibles, be approved for one month, may the same appointments be

made and approved in the succeeding month, no notice having been sent by the Commission that eligible registers existed from which regular appointments could be made, and, as a matter of fact, there being no eligibles, but a new requisition not having been made by the department for the second month?

If rule 31 of the Civil Service Commission is to be taken as a limitation of Section 10 of Article XIII of the Charter so that a temporary appointment may be made for only thirty days instead of sixty, it is necessary for the appointing power to adopt the procedure heretofore outlined for each appointment. I do not decide at this time whether an appointment having been made for a period of thirty days can be repeated at the end of that time and thus continue indefinitely without civil service examinations.

You state in your communication that there are more than one thousand persons holding temporary appointments at the present time. Section 10 authorizes the temporary appointments to be made "to prevent the stoppage of public business or to meet extraordinary exigencies" and provides that such appointments are "to remain in force not exceeding sixty days." If this section is to be interpreted literally it would mean that no temporary appointments in any event should continue for a longer period than sixty days, that the necessary examination must be held within that period, and that, if the necessary examinations were not so held, that no appointment, either temporary or permanent could be made until such examination had been held. It is not necessary, however, to decide this. It may be that the Charter framers did not assume that there would be a thousand or more extraordinary exigencies occurring simultaneously and continuing over a period of eighteen months or more and did not provide for such an occurrence. Or it may be that they did attempt to provide for what has occurred here by limiting such temporary appointments to the full period of sixty days and no longer. If such is the case any interested party has the right to insist, by mandamus if necessary, that the proper examinations be held within such time.

3. Does the last sentence of Section 10, Article XIII of the Charter, which provides that "temporary appointments may remain in force not exceeding 60 days, and only until regular appointments *** can be made," mean that temporary appointments, having been made and approved, they may remain in force until regular appointments can be made, although the period may exceed 60 days, or is it required that the same appointments be approved repeatedly, month after month, or every 60 days, until regular appointments can be made?

Answer. This query is answered in part by the answer to the second query, but it may be said in addition that the words "and only until regular appointments can be made" appear to be a limitation upon, and not an extension of, the period of sixty days contained in the first part of the sentence.

4. Is the approval of the Commission, in the manner set forth in this letter, and in accordance with long established usage and procedure, sufficient to make the September appointments valid?

Answer. The approval of the Commission as set forth in your communication appears to be nothing more than an approval of the salary roll which is in the nature of an approval of the demands for salaries. This method does not conform with the method hereinbefore outlined.

5. Do the words "with the approval of the Commissioners" mean that in every instance such approval must be given before an appointment can be made to prevent the stoppage of public business?

Answer. It is immaterial whether approval of your Commission is given before the appointment is made or after, provided, that before such appointment has been made the Civil Service Commission has had an opportunity to examine the nature of the duties of the position and to notify the appointing power that no eligibles are available. This opportunity would arise when the Civil Service Commission has made the necessary classifications, as above described.

6. If approval be given in August, would not such approval

be a prior approval for the same places in September, there being no eligibles?

Answer. As, under Rule 31 of your Commission, the temporary appointments cannot extend over thirty days, it is necessary that a new appointment be made at the end of that time, which appointment must be approved in the manner above outlined.

7. Is it not the purpose of the last sentence of Section 10, Article XIII, to give warning of temporary appointments to the Commission, and is not compliance with the substance of the law accomplished by sending in the roll of appointees, the duties being known? In other words, if the substance of the law is followed, is the form material?

Answer. Section 11 of Article XI of the Charter provides that "all officers, courts, boards and heads of departments vested in this Charter with the power to appoint deputies and others," shall "make such appointments in conformity with the rules and provisions prescribed by this article and any appointment not so made shall be void." This provision renders the terms of the article regarding the appointment of subordinates mandatory and not directory. Such being the case the form of the law is just as material as is the substance. Such was the decision of the District Court of Appeal in *Shaw v. City and County*, 13 Cal. App. 547.

8. If it be sufficient for the Commission to approve a prior request for temporary appointments, in the absence of eligibles, under what section of the law is it necessary, if at all, for the Commission to approve the roll, giving the names of appointees?

Answer. It is not necessary for your Commission to approve the roll of temporary appointees in any case. Section 5 of Chapter II of Article IV of the Charter provides that the Auditor shall approve no demand unless the same has been allowed by every officer, board, department or committee required to act thereon. Section 19 of Article XIII of the Charter requires the Civil Service Commissioners to certify to the Auditor all appointments to places of employment in the class-

ified civil service and all vacancies occurring therein. There is nothing in the Charter requiring your Commission to approve demands of the appointees in the classified civil service either directly by the approval of the warrants for salaries or indirectly by the approval of the salary roll of any particular department and your Commission has no authority to reject any such demands. The question of the payment of such demands is one for the Auditor to decide and the approval thereof by the appointing power does not relieve him from responsibility if such appointment is invalid. (See *Geimann v. Board of Police Commissioners*, 158 Cal. 754.)

9. Section 13, Article XIII of the Charter provides that "immediate notice in writing shall be given by the appointing power to the Commissioners of all appointments *permanent or temporary*." Is not the sending the roll of temporary appointees the notice contemplated by this section? And if such roll be sent, and the appointments be then approved by the Commission, has not the full substance and spirit of the law been followed?

Answer. This has already been covered in the answer to the previous query.

10. Sections 9 and 10, Article XIII, set forth the procedure for making regular appointments from eligible registers or lists, by requisition and certification, but does not the last sentence of Section 10, covering temporary appointments, to prevent the stoppage of public business, "and only until regular appointments can be made," provide an exception from the procedure set forth in Sections 9 and 10.

Answer. The procedure set forth in Section 9 and the first part of Section 10 of Article XIII covers a method of making regular appointments from eligible registers, while the last sentence of Section 10 covers the method of making temporary appointments. The last sentence is an exception to the other provisions of Sections 9 and 10 in so far as it authorizes the making of temporary appointments where regular appointments cannot be made, but this sentence does not contain any method of procedure for making such temporary appointments.

I have answered the specific questions presented, and, as being possibly applicable to some of those questions, I will add that the records of all of the departments in the City, including the Civil Service Department, having been destroyed by fire, that should questions as to the regularity of requisitions or appointments or certifications arise relating to periods before the destruction of such records, your Commission should apply the well known rule of law that public officers are presumed to have performed the duties required of them by law.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

If Temporary Appointments of Lieutenants of Fire Department are Made, they Must be from the Highest Eligibles.

October 9th, 1911.

Gentlemen: I have your communication of October 6th enclosing communication from the Civil Service Commission regarding the appointment of lieutenants in the Fire Department.

In the action entitled O'Malley v. Dillon, et al., No. 37,981, a temporary restraining order was granted by Judge Murasky restraining your Board from making appointments from the eligible list certified to you by the Civil Service Commission for the position of lieutenant. This temporary restraining order was dissolved and the order to show cause discharged at the hearing before Judge Murasky on October 6th, 1911. An agreement was made with Judge Murasky, however, that pending the hearing of the petition for a final injunction your Board should be authorized to fill these positions by the appointment of the men standing highest on the eligible list, such appointments, however, to be temporary and not to take the nature of a permanent appointment so as to prevent the

removal of the men appointed if the Court should finally determine that the appointments were void.

The communication of the Civil Service Commission above referred to is not in conflict at all with these views. The statement of the Civil Service Commission goes merely to the effect that if temporary appointments are made such appointments will be approved by the Civil Service Commission only in the case where made from the men standing highest upon the Civil Service register.

You are therefore advised that there is no objection to your proceeding along the lines suggested by the Civil Service Commission and that there is no restraining order of any court preventing you from so proceeding. The agreement made with the Court at the hearing on October 6th conforms with the suggestion of the Civil Service Commission.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

The Charter Amendment Permitting the Panama-Pacific Exposition Company to use for Exposition Purposes a portion of Golden Gate Park is a Valid Amendment.

October 9th, 1911.

Gentlemen: I am in receipt of your request for an opinion under date of September 27th, as follows:

“The Board of Park Commissioners of the City and County of San Francisco ask your advice upon the following matter:

The Charter of San Francisco provides that the Park Commissioners shall have sole control over certain property. An amendment thereto has recently been passed as to the Panama-Pacific Exposition Company having control of a certain portion of Golden Gate Park .

Query No. 1: Was this charter amendment properly passed, and is the same valid? Can a gift of public property under our Constitution be made to a private corporation?

Query No. 2: Is action necessary upon the part of the Board of Park Commissioners or by the Exposition Company with reference to the area involved in the amendment, if valid?

Query No. 3. Can the Exposition Company take over, if any, a part of said area, or must they take the whole thereof?

Query No. 4: Can the Exposition Company, if they take over any of the said area, do so without making arrangements for the restoration thereof to the condition that it was in at the time it was taken by them, and can the Exposition Company at will take over a portion of the area, use and damage the same, and then relinquish the same back to the jurisdiction of the Park Commission, and thereafter and within the period named, if the Exposition Company desires said property can they again take it? In other words, can the said area, or portion thereof, be taken from time to time, and if so, upon whom lies the expense of keeping the same in order? Does "Management and control" and "possession and use" give the Company the right to change the physical lines of the Park and destroy the trees or other property therein with or without restoration or compensation.

And for a final query: If the area is to be turned over to the Exposition Company, by the Park Commissioners, will you draft the form of a resolution, and would it be within the province of the Board to ask and require a bond or deposit of money for the restoration of the used area or drainage?

Opinion.

Answering query number 1, I beg leave to advise you that the amendment to Sec. 1 of Art. XIV of the Charter, which amendment reads as follows:

"The lands designated upon the map of the outside lands of the City and County, made pursuant to order No. 800, by

the word 'park', extending from Stanyan Street to the Pacific Ocean, and known as Golden Gate Park; also the land fronting on Haight Street, designated on said map by the word 'park', and known as Buena Vista Park; also the lands designated on said map by the word 'avenue', extending from Baker Street westward until it crosses Stanyan Street; also that certain highway bounded on the west by the Pacific Ocean, and designated upon said map as 'great highway'; also Mountain Lake Park; also Seal Rocks, as ceded to the City and County of San Francisco by Act of Congress; and all the other parks and squares in the City and County, and all the grounds surrounding public buildings in the City and County, and all parks and squares and public pleasure grounds hereafter acquired by the City and County shall be under the exclusive management of a Board of Commissioners, who shall be known and designated as Park Commissioners, except that children's playgrounds and recreation centers outside of Golden Gate Park, shall, to the extent of their use as such playgrounds and recreation centers, be under the exclusive management and control of the Playground Commissioners; provided that the Panama-Pacific International Exposition Company (a corporation organized under the laws of the State of California, March 22, 1910) is authorized to assume and take over the management and control, and to have the exclusive possession and use, of that portion of Golden Gate Park westerly from Twentieth Avenue, as extended, for the purposes of an exposition to celebrate the completion of the Panama Canal, such management and control, and possession and use, to terminate not later than one year after the closing of such exposition,"

is a valid amendment and was passed pursuant to authority granted under an amendment to the Constitution of the State of California, which reads as follows:

"Article XI, Section 8a. The Charter of the City and County of San Francisco may be amended, in addition to

the method and the times provided in Section 8 of Article XI of the Constitution, in the following particulars:

(a) * * * * *

(b) * * * * *

(c) Granting to said Panama-Pacific International Exposition Company the exclusive possession and use, together with the management and control, of that portion of Golden Gate Park in the City and County of San Francisco west-erly from Twentieth Avenue, as extended, for such exposi-tion purposes, such possession and use, also management and control, to terminate not later than one year after the closing of such exposition.

(d) * * * * *

(e) * * * * * Proposals to amend the Charter of the City and County of San Francisco in the foregoing particu-lars may be submitted by the legislative authority of said City and County to the electors of said City and County, at any general or special election (and a special election may be called therefor) held in said City and County, after the publication of such proposals in a newspaper of general circulation in said City and County, for such time as shall be determined by said legislative authority. Upon the ratifica-tion of any such proposed amendment by a majority of the electors of said City and County voting at such election on such proposed amendment, said proposed amendment re-ceiving such majority vote shall become operative imme-diately as an amendment to said Charter, without the neces-sity of approval thereof by the Legislature.

Any act of the legislative authority of the City and County of San Francisco, in submitting to the electors of said City and County at any general or special election proposals to amend the Charter of said City and County in the fore-going particulars, including any notice by publica-tion or otherwise of such proposals, and of such election, and the holding of such election, in accord-ance with the provisions hereof, before the adoption of this amendment, are hereby validated in all respects as if per-

formed subsequent to the adoption of this amendment. The disbursement of all funds obtained from said bonds shall be accounted for by said Panama-Pacific International Exposition Company by an itemized statement thereof to be filed with the Auditor of the City and County of San Francisco. (New section added by amendment adopted November 8, 1910.)

Answering query number 2, you are advised that no action is necessary upon the part of the Board of Park Commissioners, but the Exposition Company may from time to time select such area as may be included in the amendment.

Answering query number 3, you are advised that the Exposition Company is not obliged to take over the whole area until such times as the needs of the Exposition demand.

Answering query number 4, you are advised that there is nothing in the amendment to the Constitution or the amendment to the Charter which requires the Exposition Company to make any arrangements for the restoration of the Park, but the language authorizes it to take over the management and control and have the exclusive possession and use without any qualifying conditions. The determining fact shall be the desire of the Exposition authorities and not the policy of the Board of Park Commissioners. The Charter was amended by an overwhelming majority vote of the people, and the language of the amendment expresses the will of the voters. This is further evidenced by the adoption by the voters of the State of California of the amendments to the Constitution of the State of California authorizing the amendment to our Charter and the language in both amendments is identically the same. The people both of the State and of the municipality have shown their desire that the Exposition Company, in case it sees fit, may use a portion of Golden Gate Park for exposition purposes, and I take it to be the duty of all City officials to aid in the accomplishment of such desire.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Park Commissioners.

**Expenses of Sewer Work in Front of City Property May Be
Paid Out of Proceeds of Certain Bonds of 1904.**

October 9th, 1911.

Gentlemen: I am in receipt of your communication of October 4, 1911, wherein you ask to be advised whether your Board may proceed in conformity with the terms of Resolutions 8362 and 8363 of the Board of Supervisors authorizing the construction of sewer and street work in front of City property, the expense thereof to be paid out of the funds derived from the sale of the Sewer Construction Bonds of 1904 and the Street Improvement Bonds of 1904, respectively. There is nothing in your communication to suggest why your Board should not carry out the terms of these two Resolutions, but I assume, from the fact that you request an opinion, that there is some doubt whether the moneys derived from the sale of these public improvement bonds can be expended upon work done in front of City property where such work is not designated in the plans and estimates submitted to the Board of Supervisors prior to the bond issue.

This whole matter was fully discussed by the Supreme Court of this State in the case entitled *Clough vs. Duffy*, 152 Cal., 311, wherein the Court held that the moneys derived from the sale of Street Bonds of 1904 could be used in the improvement of Sutter Street from Van Ness Avenue to Sansome Street, though such street was not included in the plans and estimates submitted to the Board of Supervisors by the City Engineer. The Court held that the plans and estimates of the City Engineer were ordered by the Board of Supervisors merely for its information and the better to enable the Board to correctly estimate the cost of the proposed improvement of the accepted streets and the amount of the bonds which the respective proposals should name. Such is also the rule in the action entitled *Hammond vs. City of San Leandro*, 135 Cal., 450.

The Supreme Court further held in *Clough vs. Duffy*, at page 315:

“The voters are presumed to have acted upon the notice of submission of the proposal, which was general in its character, and with the understanding that the contemplated bonds were to be used generally for the repair and improvement of the accepted streets according to the discretion and direction of the City officials who had authority over that matter.”

The City is empowered to improve its own property and has the same right and obligation to improve streets fronting on City property as it has to improve accepted streets.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Clerical Errors of the Board of Examination May Be Corrected and Certificates to Teachers Erroneously Granted May Be Revoked.

October 9th, 1911.

Gentlemen: I am in receipt of your request of the 3rd inst., as follows:

“I am directed by the Board of Education to respectfully request from you an opinion as to the legality of the revocation of special certificates by the Board of Education, upon the recommendation of the Board of Examination, because of an error made in the grading of the candidates as a result of their examination.

The circumstances are these:

That at the semi-annual examination held by the Board of Examination in April, 1911, a number of certificates were recommended by that Board, to candidates who had received grade sufficient to entitle them to pass. It later developed that one member of the Board of Examination had totaled the marks for each candidate wrongly, and that instead of receiving a passing grade, the grading was below the passing mark.

The Board of Examination promptly recommended to the Board of Education the revocation of these certificates and the matter is now before the Board of Education for final action."

Opinion.

You are advised that inasmuch as the recommendation made to the Board of Education by the Board of Examination was the result of a clerical error made by the Board of Examination in the calculation of the grading of the teachers who had taken the examination, your Board can, after having this matter called to its attention by the City Board of Examination, revoke any certificate issued as a result of the erroneous data communicated to your Board by the said Board of Examination.

The certificates never would have been issued in the first place, had it not been for this mistake in so recommending the granting of these certificates; and so, certificates so erroneously granted may, of course, be revoked.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

Revocation of Licenses—Power of Board of Supervisors Over a Licensee—This Power May Be Exercised by a General Ordinance.

October 11, 1911.

Sir: I am in receipt of your request for an opinion of the 3rd inst., as follows:

"Please inform me as to the power of Tax Collector to revoke a license; whether he may do so of his own motion on any other grounds than recited in Art. 4, Chapter 5, Sec. 4 of the Charter—

Whether he may revoke a license if so directed by the Grand Jury or Board of Supervisors or at the request of the Board of Works."

Opinion.

I assume that this question has arisen because of the situation arising of some business in this City being granted a license by you, after having obtained the necessary consent of the Board of Public Works or some similar administrative Board, in the matter of the proper construction of premises, etc., and that subsequently these premises have not been maintained as originally constructed; and that then this administrative board would call this matter to your attention.

Sec. 4 of Chap. V., Art. IV of the Charter, dealing with the Tax Collector, provides as follows:

"He shall examine all persons liable to pay licenses, and see that licenses are taken out and paid for. In the performance of their official duties, he and his deputies shall have the same powers as police officers in serving processes and in making arrests. He may demand the exhibition of any license for the current term from any person, firm or corporation engaged or employed in the transaction of any business for which a license is required; and if such person, firm or corporation shall refuse or neglect to exhibit such license, the same may be revoked forthwith by the Tax Collector."

This is the only express power given to you to revoke a license, but in my opinion the Board of Supervisors has the power to provide generally by ordinance, that with reference to any licensee who is required by law to obtain a permit from the Board of Supervisors or from any other Board before it can obtain a license from you, that such licensee may be subjected to continued supervision by the Board of Supervisors or by such Board as is empowered to issue the permit, and that upon the Board of Supervisors or such other Board ascertaining that the licensee is failing to maintain his premises as originally required before the permit was issued, that then such Board of Supervisors or such other Board might direct you to revoke said license.

This would be based not only upon the power given in Sub. 15, Sec. 1, Chap. II, Art. II of the Charter, which empowers the Board of Supervisors "to impose license taxes and to provide for the collection thereof;" but also by virtue of the general police powers of the Board of Supervisors. Such general police powers would certainly include such necessary control over licensees as to compel them to maintain their premises after obtaining the license in the same manner as when they first were granted the license, and this control might well be exercised by authorizing the revocation of licenses as above set forth.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Illegal Ordinance Imposing a License—Payers of such License Tax Not Entitled to a Refund.

October 11th, 1911.

Gentlemen: I am in receipt of your request for an opinion of the 3rd inst., as follows:

"I am directed by the License Committee of the Board of Supervisors, to refer to you the enclosed petitions from various parties who are seeking refunds for amounts paid upon the Sealed Package Liquor License provided for under Ordinance No. 436, with the request that you forward an opinion as to the validity of these claims and advise the Committee what action they should take in regard to the same."

Opinion.

This question has been before the Courts of this State many times, and has been decided adversely to those claiming the return of license tax, paid under circumstances similar to those at issue here. A long line of decisions by the

Supreme Court hold that money so paid under a void Ordinance, is a voluntary payment and cannot be recovered. There is no statute authorizing the return of moneys so paid. A different question arises as to taxes erroneously or illegally collected on property. Section 3804 of the Political Code authorizes Boards of Supervisors to refund such taxes. Section 3819 of the same Code provides for the refund of taxes paid under protest, but that section cannot be invoked to afford relief to the claimants for the return of license taxes, as it applies only to property taxes. Even though a license tax is paid under protest, that fact alone does not render the payment involuntary.

The latest expression of opinion by the Supreme Court on the matter of voluntary or involuntary payments of a license tax, is contained in the case of *Wheeler vs. Ridenour*, 149 Cal., page 782, et seq; where the facts briefly summarized, were as follows:

The Board of Supervisors of Plumas County enacted an Ordinance imposing a license tax upon persons, firms, corporations or co-partnerships, carrying on the business of raising, grazing, herding or pasturing sheep within said County. Ridenour was arrested for failing to take out such a license. In order to secure his release he paid the license under protest. The Legislature by implication repealed said Ordinance before the arrest of Ridenour or any proceedings taken to enforce the collection of the license tax. The Court, in discussing the point whether the payment made was a payment under duress or a voluntary payment, proceeds as follows:

“Under the facts alleged in the complaint, the payment was unquestionably compulsory and involuntary, and we cannot perceive the slightest basis for the contention that it was otherwise. Laying down the general rule as to what constitutes an involuntary payment, it is said: ‘The authorities are unanimous to the effect that where one is compelled by duress of his person to pay an unjust or illegal demand, and he makes the payment under protest, such payment is

compulsory and can be recovered back.' (22 Am. & Eng. Ency. of Law, 613) 'In the absence of specific statutory provision the general doctrines as to the recovery of payments apply to the payment of taxes. Hence, taxes voluntarily paid, without legal duress or coercion cannot be recovered back; but when a person is called upon peremptorily to pay a tax to which he is not liable, and he can save himself or his property in no other way than by paying the illegal demand, he may recover the money so paid as money had and received.' (27 Am. & Eng. Ency. of Law, 757, 758) In *Osborne v. Robbins*, 36 N. Y., 371, the Court of Appeals says: 'When a party is arrested without just cause, and from motives which the law does not sanction, any contract into which he may enter with the authors of the wrong, to procure his liberation from restraint, is imputed to illegal duress. It is corrupt in its origin and the wrongdoer can take no benefit from its execution. In such a case the element of voluntary assent is wanting. The parties do not meet on equal terms. The authority of the Courts is perverted to unworthy uses. The instrumentalities employed to produce a consenting will are force and fraud, agencies which the law abhors. The prisoner is at the mercy of the accuser, and he submits to extortion as the means of deliverance from oppression under the forms of law.'

And in this State, in *Brumagin vs. Tillinghast*, 18 Cal., 272 (79 Am. Dec., 176), involuntary payment is thus defined: 'It may be said in general that there must be some actual or threatened excuse of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment from which the latter has no other means of immediate relief than by advancing the money.' "

But our Supreme Court has held that mere fear of arrest is not, in law, duress. The law requires that the party threatened with arrest, refuse payment of an unlawfully imposed license tax, and then, if arrested, he would have a complete defense by setting up the invalidity of the license law. (*Maxwell vs. San Luis Obispo*, 71 Cal., 466.)

You are advised that the illegality of the ordinance does not entitle the payers of the license tax to a return thereof; that such taxes, though paid under protest, cannot be returned; and therefore you are without power to order a refund of the license tax as prayed for in the petitions attached to your communication.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Closing of Certain Streets—Opening of New Streets in Lieu Thereof—Proceedings Must Be Before Board of Supervisors.

October 11th, 1911.

Gentlemen: Replying to your communication of the 7th inst., wherein you ask an opinion as to whether or not certain streets in the Sunset District can be closed, and other streets opened in lieu thereof, you are advised that the Legislature at the last session passed an Act entitled "An Act to provide for the disposition of lands abandoned or closed upon public streets, authorizing the execution of deeds therefor by officers of municipalities and providing for the acceptance of deeds for new streets opened in lieu of such abandoned streets," approved May 1, 1911.

The Act clothes the Board of Supervisors with power to close up any public street, wherever the Board deems it advisable, under the provisions of any general law or the Charter. In this City and County such proceedings are controlled by Chap. III, Art. VI of the Charter. The Act also authorizes the Board of Supervisors to provide for the execution of a deed or deeds in the name of the City and County by at least two officials thereof conveying its interest in such street so closed or abandoned to the owner or owners of the land fronting on such abandoned or closed street.

You are advised that any proceedings for the closing or abandoning of any street or streets and the deeding by the City and County of its interest in such street or streets should be initiated by the Board of Supervisors under Chap. III, Art. VI, of the Charter. Therein is laid down the method whereby any street in this City or County can be closed and that power is granted exclusively to the said Board, and you are further advised, that under the Charter and Act of May 1, 1911, your Honorable Board has no jurisdiction in the matter of closing or abandoning any street in this City and County, and the petition herein should be addressed to the Board of Supervisors.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Method of Forfeiting a Street Railroad Franchise, When the Company Has Laid Track and Has Abandoned the Same.

October 11, 1911.

Gentlemen: I am in receipt of your communication as follows:

"I am instructed by the Public Utilities Committee of the Board of Supervisors, to refer to you the enclosed copy of communication from the Bay View Improvement Association, and request an opinion as to whether or not the United Railroads hold a valid franchise on said street."

Opinion.

On June 17, 1889, the Omnibus Cable Company was granted a franchise to operate street cars along and upon Fifteenth Avenue South, now Oakdale Avenue, from San Bruno Avenue to Platte Street, now L Street South, by Order No. 2065, ap-

proved June 17, 1889, and accepted by the Omnibus Cable Company on June 20, 1889.

This franchise was granted upon the terms, conditions and restrictions as were then or might be thereafter imposed by the laws of the State of California, especially as provided in Sections 498, 500, 502 and 503 of the Civil Code of this State.

The question involved herein was very fully discussed in an opinion (page 57 of Opinions of City Attorney Long) rendered by me to the Board of Supervisors on March 11, 1908, wherein I advised the Board as to the forfeiture, for non-user of the franchise to operate a street railway on Pacific Avenue, from Polk to Devisadero Streets. In said opinion, I went fully into the effect and operation of said sections of the Civil Code, and of the question of non-user, and also as to the power of the City and County to declare a forfeiture of the franchise, holding that "such forfeiture can be decreed only at the instance of the State, when by proper proceedings, in the proper Court, an adjudication of forfeiture has been made."

"In this State such proceeding is to be brought by information of the Attorney-General of the State, either upon his own motion or at the instance of a citizen, when proper showing is made to him to warrant such proceeding."

The procedure, as outlined above, was followed in the recent proceeding whereby the Superior Court of this City and County, declared invalid the franchise under which the Sutter Street Railway Company operated horsecars on Market Street from Sansome Street to the Ferry.

I respectfully refer you to the opinion above referred to.

The above method of forfeiting a street railroad franchise would obtain where the Company complied with all the terms and conditions of its franchise in the matter of laying its tracks and operating cars thereon and afterwards abandoned the same.

Where, however, there was no compliance with the franchise and no tracks laid or cars operated, the franchise would be

forfeited by the failure of the company to comply therewith, and no proceedings would be necessary to forfeit the same.

I so advised you in an opinion rendered on May 22, 1911, in reference to the franchise on Bryant Street, between Twenty-sixth and Army Streets.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Insufficient Sureties—Filing of Additional Surety Bond—
Pro Rata Payment of Premium—Conditions.**

October 13th, 1911.

Gentlemen: I am in receipt of your communication in which you state that the United Surety Company has filed a claim with your Board in the amount of \$125, being the premium on the Treasurer's bond for the year ending January 8, 1912, and in which you also state that at a meeting of your Committee the representative of said United Surety Company appeared and stated that they had been advised by the Receiver of said Company that said Company was solvent, at which meeting said representative pointed out that as Mr. McDougald had not as yet filed a new bond, the United Surety Company had been under liability as and from January 8, 1911, and would continue to be liable until such time as a new bond is filed.

You state also that relative to the said Company's claim for payment of the full year's premium the representative of the Company stated that it would be willing to accept a pro rata payment up to such time as the new bond is filed, and you ask my advice as to what action should be taken on the claim filed by the United Surety Company.

Under date of September 28, 1911, I rendered an opinion to the Mayor in the matter of certain proposed bonds filed by

the Treasurer as additional bonds by the said Treasurer because of the insufficiency of certain sureties on bonds theretofore filed by the said Treasurer, one of which insufficient sureties was the said United Surety Company. I enclose a copy of this opinion.

You are hereby advised that you may best protect the City and County by ordering paid the premium upon this bond of the United Surety Company, by pro rating such payment for such time as may intervene from the beginning of the liability of the said United Surety Company on said bond to the filing of an additional bond or bonds as required by the ordinance of the Board of Supervisors and as described in my said opinion under date of September 28, 1911, to the Mayor; provided, however, that you should obtain from the said United Surety Company an acknowledgment in writing that the said United Surety Company is liable on said bond of the said United Surety Company for the interval of time for which said premium may be so paid.

Respectfully,

PERCY V. LONG,
City Attorney.

Finance Committee,
Board of Supervisors.

Sears Street—Map Thereof by City Engineer—Power of Board of Supervisors to Ratify a Map Changing Lines of Street.

October 17th, 1911.

Gentlemen: I am in receipt of your request for an opinion of the 7th inst., as follows:

“The Board of Public Works herewith transmits a map prepared by the City Engineer, and relating to the lines of Sears Street, and desires to be advised whether or not it is within the power of the Board of Supervisors to ratify and confirm

said map. The history of the matter is more fully set forth in the accompanying report of the City Engineer relating thereto, dated September 5, 1911."

Opinion.

Disregarding all questions concerning the width of Sears Street between Sickles and Sherman Avenues, in West End Map No. 2, and confining this opinion to the single query propounded by you, you are advised that the Board of Supervisors, in the absence of any prior action in the premises, is vested with power to ratify and confirm, by a proper ordinance, the map prepared by the City Engineer, relating to the lines of Sears Street, after the same has been approved by a Resolution of the Board of Public Works.

In this connection, I respectfully direct your attention to Ordinance No. 807 (New Series), whereby the map of Relief Home Tract, formerly known as the Almshouse Tract, was approved and adopted as the official map of said tract, under circumstances similar to those presented in this matter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

The Board of Supervisors Is Empowered to Order the Closing of a Street under Article VI, Chap. 3 of Charter.

October 18, 1911.

Gentlemen: I am in receipt of your communication of the 9th inst., as follows:

"The Board of Public Works, by Resolution 13,798, second series, requests that you furnish an opinion as to whether or not a certain portion of Turk Street, between Masonic Avenue and Parker Avenue can be closed.

For your information, there is herewith enclosed a copy of the petition of the Roman Catholic Archbishop of San Francisco, together with the City Engineer's report relating thereto."

Opinion.

Under the provisions of Chap. 3, Art. VI, of the Charter the Board of Supervisors is vested with full power to order the closing up in whole or in part of any street within the City and County. This chapter is almost identical with the Act of the Legislature, approved March 6, 1889, (Statutes 1889, p. 70), entitled "An Act to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane, alley, court or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose.

On April 19, 1897, the Board of Supervisors passed an order, declaring the northerly thirty-one feet and three inches of Turk Street between Masonic Avenue and St. Joseph's Avenue to be closed and vacated, thereby reducing the width of that portion of Turk Street from one hundred feet to sixty-eight feet and nine inches. Some of the property owners on the south side of Turk Street where reduced in width instituted a proceeding for a review of the action of the Board of Supervisors, and a judgment annulling said Order, upon the ground that in adopting it the Board acted in excess of its jurisdiction.

The Supreme Court, in said action, *Brown vs. Board of Supervisors*, 124 Cal., page 274, et seq., approved and confirmed the action of the Board of Supervisors, upholding the validity of the proceedings taken to close said street under the Act of 1889, using this language:

"The authority to close a street 'in whole or in part,' which is conferred by the act of March 7, 1889, authorizes the board to diminish the width of the street, and the adoption of the order is a determination by the board that the public interest or convenience requires the improvement. 'The legislature has by the statute referred to conferred upon that body the power

to open and close streets 'whenever the public interest on convenience may require,' and the determination of this question by that body is not open for review by the courts.'" (Symons v. San Francisco, 115 Cal. 555.)"

The Court also held that no damages were or could be sustained by the owners of property on the southerly side of said street by reason of the reduction in width thereof.

The decision of the Supreme Court, in that case, passing upon the provisions of the Act of 1889, applies with equal force to the provisions of Chapter 3 of Article VI of the Charter, which, as I have already stated, are almost identical.

In view of the foregoing you are advised that the Board of Supervisors possesses full power to order the closing of Turk Street between Masonic and Parker Avenues in accordance with the petition of the Roman Catholic Archbishop of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Hetch-Hetchy Water Bonds Unavailable for the Purpose of Supplying Water from any other Source.

October 20th, 1911.

Gentlemen: I am in receipt of a copy of Resolution No. 8660 (New Series) reading as follows:

RESOLVED, That the City Attorney be and he is hereby requested to furnish this Board with his opinion as to the legality of expending money out of the Hetch Hetchy Water Bonds, to lay pipes and mains in the University Mound District for the purpose of supplying the inhabitants of said district with water to be purchased at meter rates from the Spring Valley Water Company; and be it

FURTHER RESOLVED, That the City Engineer be and he is hereby requested to furnish estimates of the cost of laying said pipes.

Opinion.

The bonded indebtedness for the water supply of the City and County of San Francisco authorized by the special election held January 14, 1910, was pursuant to a series of Ordinances each having a recital as follows: "A proposition to incur a bonded debt of the City and County of San Francisco to the amount of forty-five million dollars for the purpose of the acquisition, construction and completion of a public utility, to-wit: a water supply and works to be owned and controlled by the City and County of San Francisco to furnish to the said City and County and to the inhabitants thereof a sufficient supply of water for all purposes, the sources of such supply to be Lake Eleanor, the waters of the Tuolumne River and its tributaries in Tuolumne County, California."

The municipal ticket upon which appeared the proposition for or against which the voters were to register their will contains in exact words the language above quoted.

You are therefore advised that it would not be proper to expend money out of the water bonds already voted for the purpose of laying pipes or mains in any portion of the City and County of San Francisco unless such pipes and mains be an integral part of the proposed Lake Eleanor and Tuolumne water supply. Whether such work would be a part of that proposition is a matter for you to be advised upon by the City Engineer. I know of no authority either in the Charter or within the authorization of the voters which will permit the City to construct a distributing system or a portion of it required by the Tuolumne water supply and then before that supply is at our doors to purchase water to be delivered to the citizens from a privately owned company in competition with the municipal water supply.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Sale of Bonds—Bonds Should Bear Signature of Actual Occupant of Office at Time of Delivery Thereof.

October 21st, 1911.

Sir: I have your request for an opinion dated October 19th which reads as follows:

"I have at the present time in my possession One Million Dollars worth of Water Bonds, all of which have been signed by the Auditor and Treasurer and nearly all by the Mayor, but none of them by the Clerk of the Board of Supervisors. In view of the possibility of some changes in the Administration, would it not be well to have all these bonds signed by all the present officials at an early date, anyway before any of them retires from office. For your information, let me say that in the case of the issue of 1904, 3½% this was done and the Bonds are now being sold without any question to the leading bond dealers of this City."

It is the general rule that municipal bonds when delivered must bear the signature of the officers who actually occupies the office at the time the bonds are issued. Upon this point Dillon & Hibbard in their opinion approving the issue of Public Improvement Bonds of May, 1908, advised the City as follows:

"A contract or an instrument executed by a municipality * * * should be executed by persons who are in office at the time the instrument takes effect. This on general principles; but in this case Section 11, Article XII of the Charter, as amended, prescribes that the officers therein named shall sign the bond * * * . It is clear under Section 11, Article XII of the Charter that the bonds must be signed by officers in office at the time the bonds are delivered. The Treasurer, for example, in office at that time must be the officer whose name is signed on the bond as Treasurer. If you have the coupons engraved with the name of the Treasurer and there has been a change in the office after the name has been so engraved on the coupons and before delivery of the bonds, the

anomaly is presented of the name of one man signed on the bond as Treasurer and the name of another on the coupon as Treasurer. Even if this were allowable as matter of law, about which we have, to say the least, grave doubts, it would raise such practical if not serious difficulty as to interfere with the negotiations of the bonds by the City and by bond dealers."

On May 26th, upon the same subject, Dillon & Hubbard, by telegram, advised as follows:

"Bonds like other negotiable instruments take effect only upon delivery. Charter and Ordinance require bonds to be signed by Mayor, Treasurer and Auditor, coupons by Treasurer, and seal should be attested by Clerk. This implies that they shall be such officers when bonds take effect, namely, on delivery. Bond until delivery only printed paper and has no legal existence as bond."

From the examination which I have made I find the law to be as stated in the foregoing opinion of Dillon & Hubbard and I am of the opinion that you should follow strictly the advice contained in the foregoing extracts.

Such bonds as are to be delivered prior to the change in the personal of any of the officers whose signature is required thereon may be signed by them at any time before such officer relinquishes his position. Any bonds which are not to be delivered until after the change in office should not be signed by the present officers.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

Official Bonds—Sufficiency of Sureties Thereon—Supervisors May Require Additional Sureties—Mayor May Officially Bring the Matter Before the Board.

October 20th, 1911.

Sir: I am in receipt of your communication of the 17th inst. as follows:

“I am directed by the Mayor respectfully to submit to you the following matter, and to ask that you kindly favor the Mayor with a legal opinion, with reference to the same, at your earliest opportunity:

Since certain of the sureties on the bonds of City Treasurer McDougald became financially involved and passed into the hands of a Receiver, thereby disqualifying themselves as sureties on such bonds, the Mayor has been given to understand that the Treasurer has made repeated efforts to obtain new bonds but without avail. The Mayor now understands that the companies which passed into the hands of a Receiver were but temporarily embarrassed and have since rehabilitated themselves. If the Treasurer can obtain no other surety bond, would it be wise and the part of good business to consider the new status of these companies, if such, indeed, exists? If these companies cannot qualify in what manner may the Mayor proceed to comply with the law requiring the filing of bonds, etc?”

Opinion.

The Charter prescribed two methods by which the City and County officials whose bonds become insufficient may be required to furnish additional bonds. Art. II, Chap. II, Sec. 3 of the Charter dealing with the legislative department, and in particular with the Finance Committee of the Board of Supervisors states, that

“The Committee must, at least once in every six months, examine the official bonds of all City and County officers, and investigate the sufficiency and solvency of the sureties thereon,

and report in writing the facts to the Mayor. Such report shall specify each bond with the sureties, and the amounts for which each surety is bound, and state whether or not they are sufficient and solvent. Upon such report the Mayor shall take such action as shall be necessary to protect the City and County, and may require new bonds when necessary, and he may suspend any officer till a sufficient bond is filed and approved."

Art. XV deals with the subject "Bonds of Officials" and Section 5 provides:

"When under any of the provisions of this Charter, or of any Ordinance, an official bond shall be required from an officer, the Supervisors may, by resolution, require an additional bond, whenever, in the opinion of such board, such bond or any surety thereto becomes insufficient; and such additional bond shall also be required when a surety to a bond shall die or cease to be a resident of the City and County."

In the matter of the insufficiency of the Treasurer's bond the only procedure adopted of which I have been advised is that set forth in the above Sec. 5, Art. XV of the Charter; the Board of Supervisors having passed a resolution requiring additional bonds as referred to in my opinion in this matter rendered to you under date of September 28, 1911.

It is therefore my opinion that if the Mayor desires to have considered the question as to whether or not the sureties on the Treasurer's bond heretofore in said Resolution of the Board of Supervisors declared insufficient, are in fact insufficient, that the proper procedure would be for the Mayor to officially bring this matter to the attention of the Board of Supervisors that they may take action thereon. This is a question of fact with which the Supervisors should deal, and over which, of course, this office can have no control.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

**Sanitary Reduction Works—Necessary Steps To Be Taken
to Complete Acquisition of this Property by City.**

October 25th, 1911.

Gentlemen: I am requested to advise your Board as to what are the necessary steps to be taken to complete the acquisition of the property of the Sanitary Reduction Works.

On the 23rd day of February, 1909, Resolution No. 3330 (N. S.) was approved. That Resolution authorized and directed the Mayor and Clerk of the Board of Supervisors to execute, on behalf of the City and County of San Francisco, an agreement which is fully set forth in the Resolution. The agreement so authorized to be executed was executed in accordance with the Resolution. It provides that the City and County of San Francisco shall purchase and the Sanitary Reduction Works of San Francisco and the Standard Manufacturing and Supply Company shall sell to the City and County of San Francisco the lands and property of those companies used for the reduction and incineration of garbage and refuse matter. The stipulated purchase price was to be \$400,000, \$350,000 of which was to be paid upon execution of the agreement and the balance to be paid in the manner hereinafter stated. The agreement further provides that the necessary deeds and conveyances were to be deposited by the Sanitary Reduction Works and the Standard Manufacturing and Supply Company in escrow, these deeds to be delivered to the City upon the payment to the Sanitary Reduction Works of the balance of the purchase price. The real property to be thus conveyed consisted of the entire Potrero Nuevo Block No. 167, and a portion of Tide Lands Block No. 82.

As to Potrero Nuevo Block No. 167, the Companies agree to give a warranty deed. As to the portion of Tide Lands Block No. 82, the Companies agree to convey only such title as they might have to that parcel. The reason that the Companies would not agree to give a warranty deed to the portion of Tide Lands Block No. 82 was that the title to that block was in dispute. From an examination of the title the Companies seem

to have the better title thereto and in addition have been in possession of the property for many years.

As to the payment of the balance of the purchase price, the agreement contains the following provision :

“Upon the execution of this agreement and the recording of the same in the Recorder’s office of the said City and County of San Francisco, and upon the deposit in escrow of the aforesaid deeds conveying and transferring the aforesaid properties, franchises and rights of the parties of the first part, then, and thereupon, the party of the second part shall pay to the said Sanitary Reduction Works of San Francisco, Incorporated, the sum of three hundred and fifty thousand (\$350,000) dollars in United States Gold Coin. The balance of the said purchase price, to wit, the said sum of fifty thousand dollars (\$50,000), shall be paid by the party of the second part to the said Sanitary Reduction Works of San Francisco, Incorporated, or order, at any time within two (2) years next succeeding the date of the execution of this agreement, provided, however, that nothing herein contained shall be construed, as obliging the party of the second part to make said final payment of fifty thousand (\$50,000) dollars, unless and until complete delivery of possession of said Potrero Block No. 167 and the works thereon of the parties of the first part, and also delivery of said deeds and conveyances so deposited in escrow shall have been made to the party of the second part; and said balance of said purchase price shall be paid on delivery of said deed and when said possession of said Potrero Block No. 167 is surrendered to the party of the second part; and the said balance of said purchase price (anything herein to the contrary notwithstanding) be due and payable two years after the execution hereof.”

Until the balance has been paid the Companies are to retain possession of the Reduction Works.

The Sanitary Reduction Works further agreed that, until the possession of the properties was turned over, to pay to the City the sum of \$17,500 annually, which is equivalent to in-

terest at the rate of 5% per annum on the said \$350,000 already paid to the Companies.

The deeds and instruments referred to in said Resolution 3330 were deposited in escrow with the First Federal Trust Company of this City pursuant to said agreement. According to the clause of the agreement relating to the payment of the remaining \$50,000 hereinabove quoted, the sum is not to be paid until the possession of the property is turned over to the City by the Companies.

The two years has now elapsed and the City has the right, under the agreement, to tender to the Sanitary Reduction Works the \$50,000, receive delivery of the deeds to the property and take over the possession of the properties. The companies also have the right, under the agreement, to tender the possession of the properties to the City and demand from the City the \$50,000 now remaining due the Sanitary Reduction Works. Until such time as the City desires to exercise its rights under the contract to take possession of the property, or until such time as the Companies desire to exercise their rights under the contract and receive the remaining \$50,000 the whole matter remains in statu quo, the Sanitary Reduction Works still retaining the possession of the property and paying to the City and County \$17,500 annually.

The purpose of executing the agreement in this way was that the Board of Supervisors did not desire to take possession of the Reduction Works until the City had constructed the first of its incinerating plants. The agreement was so drawn that the Company was to be allowed to retain the possession of the reduction plant and operate the same until the City's incinerating plant was in operation.

The two years having elapsed, however, the City has the legal right to take possession of the plant at the present time upon the payment of the additional \$50,000, or, by mutual understanding the plant may be allowed to be operated by the Sanitary Reduction Works under the conditions of the agreement, as above stated, until the City operates its new incinerating plant.

Before the City should undertake to operate the plant, however, certain Ordinances must be passed. Provisions must first be made for the maintenance and superintendence of the works. There is no budget appropriation for the maintenance of the Reduction Plant and suitable provision for that maintenance must be made.

The Sanitary Reduction Works operated under a franchise granted to its predecessors in interest by the Board of Supervisors on February 16, 1896, by Order No. 2965. That Order granted to the predecessors in interest of the Sanitary Reduction Works the sole and exclusive privilege and right to cremate and destroy within the City and County, by crematories or by process of reduction, garbage and refuse matter, and also granted to the grantees the right to charge and collect therefor the sum of twenty cents per load. The franchise further provided that all the garbage and refuse matter in the City and County of San Francisco should be delivered to the crematory and there, at the expense of the person or corporation so conveying the same, be cremated or destroyed.

When the City takes possession of the plant under its agreement with the Companies this franchise will have lapsed and expired. Should the City deem it advisable to collect charge for the cremation of garbage and refuse matter Ordinances must be passed fixing those charges. An Ordinance must also be passed requiring all persons to bring their garbage to the City's crematory. These things are necessary before the City can take over and operate the plant.

The agreement contains a provision that the plant and foundry business, together with the tools, appliances and stock of merchandise used in conducting said foundry business, owned and conducted by the Standard Manufacturing and Supply Company was not to be sold or conveyed to the City but the same was reserved by the Company. The Standard Manufacturing and Supply Company is now operating a foundry business upon Potrero Nuevo Block 167. The agreement provides that the said foundry business shall be removed after the property has been turned over to the City, but that the City

shall first give the Standard Manufacturing and Supply Company ninety days notice in writing that they desire to have the same removed. In order to receive the deeds and take over the plant, the \$50,000 remaining due can be either drawn by the Clerk or Mayor and turned into the First Federal Trust Company or a demand can be drawn upon the Treasury in favor of the Sanitary Reduction Works whenever it is deemed advisable by the Board of Supervisors to take possession of the plant or whenever the Sanitary Reduction Works demands the payment of the same.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Geary Street Railway—From Thirty-third and Point Lobos Avenues to a Point Near Cliff House—City Temporarily Restrained from Constructing.

October 26th, 1911.

Gentlemen: I have your request for an opinion of October 11th which reads as follows:

“The Board of Public Works desires to be advised whether the construction of the Geary Street Municipal Railway may legally be continued from Forty-eighth Avenue at its intersection with Point Lobos on and along Point Lobos Avenue westerly to a terminal point at or near the Cliff House.”

Proposition 1, as submitted to the voters at the special election held December 30, 1909, provided for a bonded debt for the City and County to the amount of \$1,900,000 for the purpose of the acquisition, construction and completion of a street railway over and along Geary Street, Point Lobos Avenue and Cliff Avenue “from Point Lobos Avenue to a convenient terminal near the Ocean.”

This proposition having been approved by the electors, it becomes an authorization on the part of the electors and the

municipal authorities to construct a street railway upon the general lines therein outlined and the question of the location of the terminal is a matter left to the sound discretion of the municipal authorities.

Whether such decision should be made by the Board of Supervisors or by your Board need not be decided. The safest plan is for the Board of Public Works to determine upon the location of such terminal and to have such determination approved by resolution of the Board of Supervisors.

At the present time the City is temporarily restrained from constructing that portion of the municipal road on Point Lobos Avenue from 33rd Avenue to Cliff Avenue and the question of the right of the City to construct and operate its road over such streets is involved in a petition of the United Railroads to the Supreme Court of the United States for a writ of certiorari reviewing the recent decision of the Circuit Court of Appeals.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Classification of Places of Employment with Reference to
Examinations By Civil Service Commission—Separate
Positions Require Separate Classifications.**

October 30th, 1911.

Gentlemen: I have your request for an opinion under date of October 16, 1911, wherein you ask to be advised whether you may change the titles given to positions created under the Election Commission, Tax Collector and Auditor by Ordinance of the Board of Supervisors so that the same may be given one general classification of "Deputies," or whether you must, because of the title and regardless of the duties, classify separately each position created by the Board of Supervisors.

Sec. 2 of Art. XIII of the Charter requires your Commission to classify all places of employment in or under the offices and departments of the City and County mentioned in Section 11 of Article XIII "with reference to the examinations hereinafter provided for." To aid in this classification your Board may request of the appointing power a statement of the duties to be performed by the deputies or employees and a proper classification can be made only with regard for such duties. Any classification which included in the same class a deputy under the Election Commission and a deputy in the Tax Collector's or Auditor's office would be manifestly unreasonable and would necessarily be set aside on the complaint of any interested party. Where the classification has been made by the Civil Service Commissioners and there is a question as to the exercise of the discretion of the Commissioners in making such classification the Courts are powerless to interfere and to substitute their discretion for that of the Commissioners. Where, however, the classification is based upon facts which make it wholly unreasonable or arbitrary then it is within the power of the Courts to set aside such classification. *People vs. McWilliams*, 185 N. Y., p. 98, 77 N. E. 785; *Dillon on Municipal Corporations*, 5th Ed. Sec. 399, 402; *Dill vs. Wheeler*, 185 N. Y., 196, 77 N. E. 789; *Opinions of the City Attorney of S. F. (Percy V. Long)* 1908-9, p. 28.

All of the positions noted in your communication are additional places created by the Board of Supervisors under the terms of Sec. 35, Art. XVI of the Charter. Those places to be valid must be additional places to those authorized by Charter. It is only upon such theory that the Mayor may recommend the creation of the places and that the Board may utilize the appointment of the additional deputies or employees and fix their salaries.

Sec. 3, Chap. I, Art. XI of the Charter authorizes the Election Commission to appoint a Registrar of voters who shall be Registrar and Secretary of the Board, and who shall keep a record of its proceedings and execute all orders and enforce all rules and regulations adopted by the Board. Sec. 4 of the

same chapter authorizes the Election Commissioners to appoint "such other clerical assistants as may be necessary at a salary not to exceed one hundred dollars a month each for the time actually employed." The Ordinance of the Board of Supervisors authorizes the Election Commission to appoint in addition to those authorized by the Charter one Deputy Registrar at one hundred and fifty dollars a month and one Chief Clerk at one hundred and fifty dollars per month. Manifestly the position of Deputy Registrar is different from that of the clerical assistants referred to in Section 4 above. The Deputy Registrar would naturally perform, in the absence of the Registrar, all of the duties of the Registrar and Secretary of the Board, keep the records and proceedings of the Board and execute and enforce all orders and rules of the Board. He would be authorized to sign for the Registrar and to perform all of the duties that the Registrar could perform if present. A clerk could not perform these duties. A clerk would be in every sense an employee while a Deputy Registrar, on the other hand, would be an officer as that term is used in distinction from a mere employee.

It can be easily seen how the position of Chief Clerk is also different from that of the clerical assistants authorized by Section 4 above mentioned. The Chief Clerk is a person who stands in the position of the foreman over the clerical assistants and would be the one to whom the Board would look to personally execute its orders as regards the work of all of the other clerical assistants employed by the Board.

The question of the necessity for the creation of such positions is one with which you have nothing to do. The necessity must be determined by the Mayor after investigation and this must be approved by the Supervisors in the passage of the Ordinance. Where the determination of the necessity of a particular act is imposed upon a particular officer or board in a municipality such a determination of necessity is final and cannot be inquired into by another Board or by the Courts. The only remedy which the people have in case of a wrongful abuse of such power is in the change of administration by the

ballot. Dillon, Mun. Corp. 5th Ed., Sec. 402; Cox v. Jones, 63 Atl., 178 (N. H.); Talcott v. Buffalo, 125 N. Y. 280, 26 N. E. 263; Ghost Cov v. Pittsburgh, 177 Fed. 936, 942.

The determination of the necessity for additional positions under the Election Commission and the creation of such positions having been made by the officers upon whom the duty is imposed, your Board must accept such determination and classify the positions accordingly.

If, however, the Board of Supervisors have merely authorized the appointment of additional deputies or employees to those which are authorized by the Charter and such additional deputies or employees are to perform the same duties as those authorized by the Charter, you may then not make any distinction by classification or otherwise between those appointed under the Charter authorization and those appointed under the Ordinance. Taking as an instance, the Ordinance creating six additional Assistant Deputies in the Auditor's office and fixing the salaries thereof does not create positions of a different class than the Assistant Deputies which are authorized by the Charter though the salaries of the Charter place are lower than those authorized by Ordinance.

There is no authority under the Charter or otherwise for the classification of positions upon the basis of the salary to be paid, that is to say, there should be one class in the Auditor's office of Assistant Deputies, two of whom will receive \$125 per month, provided by Charter, five of whom will receive \$150 a month and one of whom will receive \$200 a month. Though under Section 8 of Article XIII of the Charter your Commission is required to provide for promotion in the classified service it does not necessarily follow that because one position in the same department pays a higher salary than another of the same class that the former position must be filled by promotion. This section merely requires that you are to provide that vacancies shall be filled by promotion "when practicable." All of these positions created by Ordinance are merely temporary in their nature; that is, they may be abolished at any time, by Ordinance of the Board of Supervisors, while those created by the Charter can only be abolished by an amendment

to the Charter in the official manner. As the Ordinances creating the positions may be repealed they may be also amended by changing the salary authorized therein, either by lowering or raising the same. If your classifications were based upon the salary attached to the positions your classifications would have no permanency and would be always subject to change by another body in the alteration of the salary fixed.

Where, however, the duties of the position are clearly distinctive from those of another position in the same department it is not only your right but your duty to provide that the positions higher in rank should be filled by promotion if practicable and that the examinations for such promotion shall be confined to those of the next lower rank. Thus, where, as under the Election Commission, the position of Chief Clerk is provided for, it naturally follows that such a position is higher in rank than that of mere clerk, and to comply with the spirit of the Charter it would be necessary for your Board to classify such position as that of a higher rank than that of clerk and to confine the examinations for the position of Chief Clerk to those holding the rank of clerk.

Whether the positions of Expert Accountant, Assistant Cashier, Expert Searcher and Expert Block-book-men in the Tax Collector's office are of a higher rank than the position of Deputy of the Tax Collector's office is a matter for your Commission to decide not upon the question of the salary attached to the respective positions but with a consideration of the duties to be performed so that the classified Civil Service may be a benefit to those employed as well as a benefit to the City and so that members of the classified service may have the hope of advancement to position of higher rank and at the same time the City may have the benefit of securing for positions of greater responsibility men who have been tried in other positions of less responsibility.

Whatever may be the result of your determination as to rank and promotional examinations to fill these positions it is clear that the duties are distinct and that a proper classification can only be made by placing each of the separate positions in a separate class.

As to the positions authorized in the Auditor's office it would also follow that those of Bookkeeper and Statistician are different from those of Assistant Deputy and that they must be separately classified. Following the views heretofore advanced the position of Assistant Deputy in the Auditor's office may be placed in one class without regard to the salary now authorized to be paid to the respective positions. If the positions of Bookkeeper and Statistician are of greater responsibility and the duties are such that the positions could be filled by promotion from the rank of Assistant Deputy, then these positions should be given a higher rank than that of Assistant Deputy and promotional examinations should be provided for.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

City Not Responsible for Loss of Horse of Dr. Kellogg, Occasioned by Slipping on a Defective Manhole Cover.

November 6th, 1911.

Dear Sir: I have your request of the 2nd inst. in which you ask an opinion as to whether the City can compensate Mr. Paul F. Kellogg on account of the death of a horse belonging to him, said horse having stepped on a defective manhole cover at the intersection of First and Market Streets and broken his leg, which necessitated his being shot by a policeman.

You are advised that if there is any responsibility at all in this matter it must rest upon those who had charge of the said manhole cover. The City cannot be held liable in any event and therefore no money could lawfully be ordered paid by the City in this matter.

Sec. 5, Art. I of the Charter which relieves the City of any such responsibility reads as follows:

"No recourse shall be had against the City and County, or any board of officers thereof, for damage or loss to person or property suffered or sustained by reason of the defective condition of any sidewalk, street, avenue, lane, alley, court or place, none of which has been finally accepted by the Supervisors of the city and county as by law, or as in this charter provided; nor shall there be any recourse against the city and county, or any board or officer thereof, for damage to person or property suffered or sustained by reason of accident on any such sidewalk, street, avenue, lane, alley, court or place; but in any such case the person or persons on whom the law may have imposed the obligation to repair such defect in any such sidewalk, street or public highway, shall be liable to the party injured for the damage suffered or sustained.

When any portion of the roadway of a public street in the city and county which has been accepted by the Supervisors as provided by law, shall be in such defective condition as to endanger persons or property in the use thereof; or when any public sewer is defective or in want of repair, it shall be the duty of the Board of Public Works to cause any such defect in such roadway or in such sewer to be remedied or repaired. And, if through the official negligence of the said board such defect remains unremedied or unprotected, and in consequence thereof damage or loss to person or property is sustained or suffered, the said board shall be liable to the party injured for the damage sustained; provided that a notice in writing directing attention to the existence of such defect, and specifying the particular street and block thereof whereon or wherein such defect exists, shall have been served upon the said board at last five days before such damage shall have been sustained; and provided, further that there are at such times funds available to the said board for repairing or remedying such defects. As amended November 15, 1910; approved by the Legislature February 17, 1911."

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

**Legality of Proposed Ordinance Concerning Motor-Driven
Vehicles—Police Regulations Over Drivers of.**

November 8th, 1911.

Gentlemen: I am in receipt of your request for an opinion under date of November 2nd, which reads as follows:

“Pursuant to direction of the Board of Supervisors, I am transmitting herewith copy of proposed bill introduced by Supervisor Gallagher, providing for the granting of permits to drivers of automobiles and other motor-driven vehicles, with the request that you advise this Board as to the legality of the provisions contained therein.

The question has been raised by some of the members of the Board as to whether or not we could require by ordinance that an applicant for such permit furnish evidence of good moral character, inasmuch as such a qualification was not required from the drivers of hackney carriages or other public conveyances.

You are requested to consider this phase of the matter in your opinion.”

PROPOSED ORDINANCE.

Bill 1889. Ordinance No. (New Series)

Amending Section 27 of Ordinance No. 649 (New Series) entitled, “Regulating moving travel and traffic upon the streets and other public places in the City and County of San Francisco, and providing a punishment for any violation thereof.”

Be it ordained by the People of the City and County of San Francisco as follows:

“Section 1. Section 27 of Ordinance No. 649 (New Series) is hereby amended to read as follows:

Section 27. It shall be unlawful for any person, other than the owner thereof, to operate upon the streets any auto-

mobile or other form of motor vehicle unless such person shall have procured a permit in writing for such privilege from the Board of Police Commissioners of the City and County of San Francisco, after having satisfied such Board after a practical test that the applicant for such permit is capable and is a person of good moral character and has the necessary experience and ability to operate such vehicle, and the said Board of Police Commissioners of the City and County of San Francisco is hereby empowered in its discretion to grant such permit; provided, however, that no permission shall be granted to any person under twenty-one (21) years of age; provided, further, that all persons to whom permits may, or have been granted must always carry such permits and present same for inspection to any regularly authorized officer or official of the City and County of San Francisco when requested so to do; provided; further that this section shall apply only to drivers or operators of automobiles or other forms of motor vehicle.

Any permit may be revoked by the Chief of Police upon the second or subsequent conviction of the holder thereof for any violation of any law, ordinance or regulation relating to the operation of motor vehicles, subject, however, to an appeal to the Board of Police Commissioners from the order of revocation."

Opinion.

In my opinion the ordinance proposed to be adopted is a proper exercise of the police powers of your Board and, therefore, valid.

Regarding the point you raise as to the requirement that an applicant for a permit furnish evidence of good moral character, which qualification you state is not required of drivers of hacks or carriages or other public conveyances, I would call your attention to the order already in effect, No. 1611, regulating the use of vehicles on the public streets and boats in the waters of the bay.

Section 2 thereof provides that every vehicle, except railroad cars, buggies and rockaways which shall be used in this

City and County for the conveyance of persons traveling by land from place to place for hire, shall be deemed a hackney carriage within the meaning of the order.

Section 6 provides:

“Every person who desires to act as driver or motorman of any vehicle specified in this order shall obtain a written permit therefor from the Board of Police Commissioners, which permit must be renewed annually through the office of the Chief of Police.”

Under the authority of this section the Police Commissioners can undoubtedly, without it being expressly provided therein, investigate the moral character of the applicant.

Section 5 of Ordinance No. 1710, imposing a license upon public passenger vehicles and the drivers and motormen thereof, provides:

“Every person engaged in the business or occupation of driver or motorman of any public passenger vehicle specified in this ordinance shall pay \$1.00 for a driver’s badge to be issued by the Tax Collector, and to be of such design and lettering as he shall determine. Upon the presentation of a driver’s annual permit, granted by the Police Commission, the Tax Collector shall issue, free of cost, to the person named in said permit a driver’s annual identification card, provided such person is the owner of a driver’s badge.”

Respectfully,

PERCY V. LONG,

City Attorney:

Board of Supervisors.

Validity of Notice to Auditor to Withhold Moneys due a Contractor for City Work.—City Not Responsible if Auditor Disregards Notice.

November 17th, 1911.

Gentlemen: I am in receipt of your letter of November 15th requesting to be advised as to the claim of the Haslett Warehouse Company for money paid to H. W. Haley by the Auditor after notice to withhold under the provisions of Section 1184 of the Code of Civil Procedure.

I note that you state that the Auditor maintains that no **legal notice** was filed in his office but that "some one came in and wrote out a request on a slip of paper." Section 1184 of the Code of Civil Procedure reads in part as follows:

"No such notice shall be invalid by reason of any defect in form, provided it is sufficient to inform the owner of the substantial matters herein provided for."

If, therefore, the Haslett Warehouse Company had a valid claim against Haley for materials furnished under his contract with the City and if a notice was served upon the Auditor sufficient to inform him of the nature of such claim then the Haslett Warehouse Company is in a position to attack the action taken by the officials of the City.

There should be no liability whatever upon the City if the facts are as above stated, the sole liability being upon the Auditor who failed to comply with the notice. Your Board, therefore, should reject the claim of the Haslett Warehouse Company and permit it to seek its remedy.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Resignation of Member of Police Department.—Application for Reinstatement more than Three Years since Resignation Accepted, Barred by Laches.

November 22nd, 1911.

Gentlemen: I have your communication of October 31st, requesting an opinion as to the status of John H. Kramer. Your communication shows that Kramer was a member of the Police Department from April 6th, 1899, until August 15th, 1906, when he retired upon a leave of absence, and that on January 2, 1907, he tendered his resignation to the Board of Police Commissioners, which was immediately accepted.

The circumstances surrounding the resignation as set forth in the petition are such that if proven would entitle him to reinstatement, provided his application was made within time.

However, as the application is made more than four years after the acceptance of the resignation, it must be assumed that the petitioner acquiesced in the action of the Commission in bringing about the resignation. This matter was discussed in my opinion of September 8, 1911, to the Grand Jury and the views are supported by the decision of the District Court of Appeal in *Harby vs. Board of Education*, 2 Cal. App., 418.

The reason for this rule of acquiescence and laches is to prevent fraud. If the application were made within a reasonable period it would enable the Police Commissioners to reach the true facts regarding the resignation by bringing before them the persons who were members of the Board at the time the resignation was accepted. Where, however, the petition for reinstatement is made many years after the acceptance of the resignation it is impossible for the City to fully protect itself against imposition.

The same question was before Judge Sturtevant of our Superior Court in the recent action entitled *Wittman vs. Police Commissioners, et al.*, Superior Court number 15,872, where Judge Sturtevant held that the failure of Wittman to

prosecute his action for reinstatement within three years from the time of his removal barred his right, and that the running of the statute was not tolled by the filing of a petition for reinstatement with the Commissioners. This view is supported by

Barnes vs. Glide, 117 Cal., 1;

Prescott vs. Gonser, 34 Ia., 179;

San Luis Obispo vs. Gage, 139 Cal., 398.

This case is now on appeal to the District Court of Appeal. Where the rule is applied in an action at law it should be more strictly applied to proceedings before your Board.

I am therefore of the opinion that it is your duty to deny this petition upon the ground that it was not filed within three years from the date of the acceptance of the resignation.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Civil Service Examination of Experienced Clerks.—Credits for Special Clerical Experience.—Legality of.

November 18th, 1911.

Gentlemen: I have your request of November 13th, wherein you ask to be advised whether it is proper and legal for your Board to provide for the awarding of credits for special experience in the examination to be held for experienced clerks for the Board of Public Works.

In the notice of examination accompanying your request it appears that the credits for special clerical experience are to be allowed upon the basis of 100 per cent to applicants who have served for a period of four years in a clerical capacity in the Board of Public Works since January 8th, 1900, and that the applicants who have served for a period of three months

or over and less than four years will be rated in proportion, that the maximum percentage for such special experience will equal five percent on the entire examination.

Sec. 4 of Art. XIII of the Charter provides that examinations shall be practical in their character and shall relate to those matters only which will fairly test the relative capacity of those examined to discharge the duties of the position to which they seek to be appointed. Sec 8 of the same Article provides that examinations for promotion in the classified service shall be held on the basis of ascertained merit, seniority in service and standing upon examination.

These sections of the Charter indicate what is the general understanding of the purpose of the Civil Service laws; that these laws are designed to secure efficiency in the Civil Service so that the public may be benefitted by the highest class of workmen free from political interference. The purpose of these laws is not, as may be supposed by some, to give permanent employment to the individual officers and employees but such permanent employment is provided for merely as an inducement to secure better service for the public.

It is certainly evident that the fitness of a candidate for a position in the classified service can be better determined by an examination touching on the experience of the candidate had in the same or similar positions to that which he seeks and it is not improbable that such a test would be a fairer and better method of determining the fitness of the candidate than by the question and answer method upon subjects of arithmetic, grammar and spelling or other subjects which are fresh in the mind of the school graduate but become a stumbling block to those who have passed that period. The fact that the maximum percentage for special experience entitles the candidate to but five per cent on the whole examination shows that such candidate is not given an unreasonable advantage in the examination.

By fixing a period of four years special experience as covering the maximum credits to be allowed and by fixing the time of the period of the operation of the Charter as the

period within which such credits will be allowed, your Board is giving every person who has served the City in this special capacity during the operation of the Charter a fair chance to be rewarded for the services performed. If a candidate has served the maximum period the assumption is that his work has been satisfactory or he would have been removed. Credits for this experience should be limited to employment in the City and County of San Francisco as it would be almost impossible to get a correct and fair report upon such experience for employment had outside of the City and County. Furthermore the work of the Board of Public Works of this City and County under our Charter is so different from that of any other public body within the State that it is evident that experience had under such Board would be of greater value than experience had outside of the City and County.

You are therefore advised that it is both proper and legal for your Board to provide for the awarding of credits for special experience as provided for in your notice of examination for experienced clerks in the Board of Public Works.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Dead Animals on Public Streets.—Right and Duty of Sanitary Reduction Works to Remove and Dispose of the Same.—New Agreement with Sanitary Reduction Works.

November 20th, 1911.

Gentlemen: I am in receipt of a communication from the Clerk of your Board, dated November 15th, 1911, which reads as follows:

“I am instructed by the joint committees on Finance and Hospital and Health, to request your opinion as to whether

the City has the right to advertise for proposals for a franchise for the removal and destruction of dead animals found on the public streets, or if the Sanitary Reduction Works has franchise for same."

Opinion.

The Sanitary Reduction Works is at the present time the successor in interest of a franchise granted by Order 2965 of the Board of Supervisors on the 17th day of February, 1896. Section 6 of that Order reads as follows:

"The said grantees, their associates and assigns, shall from and after the first day of December, 1902, have the sole and exclusive right and privilege, during the continuance of the remainder of the term of this franchise, to remove and dispose of the carcasses of all dogs killed at the Public Pound, and all animals impounded and not redeemed by the owners thereof, and which are valueless and cannot be sold; also to remove and dispose of the carcasses of all dead animals found upon the public streets, and the carcasses of all dead animals in said city and county not slain for human food which shall not be removed or disposed of by the owners thereof so as not to become a nuisance within six hours after the death of the same; provided that in the event the parties now holding and exercising this privilege of removing the dead animals not slain for human food should hereafter fail or refuse to remove the dead animals, and should forfeit their contract with said city and county, then, immediately upon such forfeiture, the right to remove said dead animals shall vest in the grantees herein, their associates and assigns, under this order."

The City now has an agreement with the Sanitary Reduction Works by which it is agreed that the City shall purchase the works and properties of the Sanitary Reduction Works. That agreement is set forth in Resolution No. 3330 (New Series) passed February 15th, 1909.

That agreement further provides that the Sanitary Reduction Works shall also grant and convey to the City all

rights and privileges held by the Sanitary Reduction Works in and to said Order No. 2965. When the City completes the purchase of the properties of the Sanitary Reduction Works and the rights and privileges held by the Sanitary Reduction Works in and under such order No. 2965, the franchise granted by said Order No. 2965 will have become merged in the City and said order will no longer be of any force or effect. The City may then either take care of the dead animals found on the public streets itself or it will be at liberty to contract with some one else to do that work. Until, however, the City does take over the plant pursuant to said agreement the Sanitary Reduction Works has the right, and it is its duty to remove and dispose of dead animals found on the streets.

Inasmuch as the City is to soon complete said agreement entered into with the Sanitary Reduction Works the City could at the present time offer for sale a franchise or privilege for the removal and destruction of dead animals found on the public streets on condition that said franchise should not take effect until the City has completed its agreement with the Sanitary Reduction Works.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Age Qualification for Firemen Applies to Hydrantmen.—Applicant Must be Over 21 and Under 35 Years.

November 22nd, 1911.

Gentlemen: I am in receipt of your communication of November 17th, 1911, wherein you ask to be advised as to whether the position of Hydrantman in the Fire Department comes within the age restriction of "not less than twenty-one nor more than thirty-five years" as provided by the Charter. Your inquiry relates to the provisions of Sec. 6, Chap. I, Art.

IX of the Charter providing for the qualification of firemen. This section provides that all persons appointed to positions in the Department must, at the time of their appointment, be not less than twenty-one nor more than thirty-five years of age.

A proviso was added to this section by amendment of February 19, 1911, whereby the age limit was raised to fifty-five years for all engineers, mechanics and employees of the auxiliary fire system and the corporation yards, clerks in the office of the Commission and engineers and pilots of fire boats. Another proviso was added at the same time that the persons coming within this former proviso could not receive the benefits of the chapter relating to the Firemens' Relief Fund.

The inquiry is suggested here by reason of the fact that hydrantmen report to the superintendent of the corporation yard each day and from this fact it has been assumed that they may be employees of the corporation yard, as mentioned in this section of the Charter. I understand the fact to be that hydrantmen are always under the direction and order of the Chief Engineer and that they are in no sense employees of the corporation yard; that they are at all times subject to call for fire duty and are in every sense members of the fire fighting force. Such being the case the age qualification for firemen should apply to hydrantmen. That is to say, that one of the qualifications for appointment to such position should be that the applicant is over the age of twenty-one years and not more than thirty-five years.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

**Widow of Deceased Fireman Entitled to a Pension When
Husband is Killed in Performance of Public Duties In-
herently Dangerous.—Purpose of Charter Provision.—
Under the Facts Stated Widow not Entitled to Pension.**

November 20th, 1911.

Gentlemen: I am in receipt of your communication of the 13th inst., as follows:

“An application has been made by the widow of a deceased fireman for a pension, in pursuance of Chapter 7, Article 9 of the Charter of the City and County of San Francisco. The fireman met his death while on his way to his lunch at his home. He fell on the sidewalk just before reaching his home and fractured his skull, and died as a result of the injuries three days later. The fireman was on duty, and under the rules was allowed an hour for lunch. The injuries were received within thirty minutes after leaving the house. In such a case was the fireman on duty and in the actual performance of his duties when injured? And the Board wishes to know whether or not, in view of these facts, the widow of said fireman will be entitled to a pension.”

Opinion

This application is made under the terms of Sec. 5, Chap. VII, Art. IX of the Charter, dealing with the Fireman's Relief Fund, which provides as follows:

“The Commissioners shall, out of the Firemen's Relief Fund, provide as follows for the family of any officer, member, or employee of the Fire Department who may be killed while in the performance of his duty; etc, etc.”

In *Scott vs. Mayor, etc., of Jersey City*, 54 Atl. 441, the Court of Errors and Appeals of New Jersey, considered a statute which provided as follows:

“If any officer or man permanently employed in any Fire Department in any such city shall be fatally injured while

in the performance of, or attempting to discharge his duties, such municipal board shall allow the widow, if there be any,

* * * an annual pension," etc., etc.

The plaintiff's husband there fell from a trolley car while he was going from the fire house of the company to which he belonged, to take supper with his family, receiving injuries from the effects of which he died the next day. He was on duty subject to call of the Fire Department during his dinner hour and was in uniform at the time of this accident. The Court held that he was not in the performance of his duty as a member of the Fire Department at the time of the accident so as to come within the spirit of the law.

In my opinion the purpose of the Charter section is to encourage firemen in the performance of duties which are inherently dangerous and that this purpose does not contemplate any relief being given to the family of the fireman on account of such death as we here have, that is, caused as the result of a fall had while going to or from his residence for dinner.

In my opinion he was not "killed while in the performance of his duty" as that language is used in the Charter. You are therefore advised that the widow of said fireman is not entitled to a pension.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Employers Liability Act.—Premium on Policy of Liability Insurance of Shop Employees, Etc., Not a Proper Charge Against School District.

November 23rd, 1911.

Gentlemen: I am in receipt of your communication wherein you ask to be advised whether your Board is legally justified in taking out liability insurance for janitors and shop

employees and whether the premium on a policy taken out for such purpose in March of this year is a proper charge against the district.

It is a well known rule of law that no liability attaches to any city or to any public corporation for injuries received by employees when in the performance of their duties unless such liability is specifically imposed by statute. There is nothing in the Charter or the statutes of this State which specifically imposes this duty upon the City and County of San Francisco or upon the School District of this City. The Act of April 8th, 1911, generally known as "The Employers Liability Act" apparently imposes this duty upon the City and upon the School District when either elects to avail itself of the benefits of the Act.

This Act, however, is not applicable here because it went into effect on the 1st day of September, 1911, long after the policy herein referred to was issued. Such Act (Stat. 1911, Vol. 1, page 797) reads in part as follows:

"The following shall constitute employers subject to the provisions of this Act, within the meaning of the preceding section, (1) The State and each county, city and county, city, town, village and school district and all public corporations * * * who, at or prior to the time of the accident to the employee for which compensation under this Act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this Act, and who shall not, at the time of such accident, have withdrawn such election in the manner provided in the next section."

You are therefore accordingly advised that there is no liability upon the School District for injuries of the nature referred to in your communication and that the premium on a policy of liability insurance to cover such injuries is not a proper charge against the District.

Respectfully,

PERCY V. LONG,

City Attorney

Board of Education.

**Retirement of Police Officer who has Held Several Ranks.—
Half Pay Attaches to What Rank?**

November 22nd, 1911.

Gentlemen: I am in receipt of your communication of November 10th, 1911, containing the following inquiry:

“If a person is appointed a policeman on July 2nd, 1891, and served as such until December 2, 1905, upon which date he was appointed a Detective Sergeant and served as such Detective Sergeant until September 19, 1907, on which date he was reduced to his former rank of policeman; was again appointed Detective Sergeant on February 23rd, 1910, and served as such until November 2nd, 1911, upon which date he was retired and relieved from service under the provisions of Section 3, Chapter X, Article VIII of the Charter, would he be retired as a Detective Sergeant or as a policeman?”

Opinion.

Sec. 3, Chap. X, Art. VIII of the Charter provides that a member of the Department may be retired upon an annual pension equal to one-half the amount of salary attached to the rank which he may have held three years prior to the date of such retirement.

Sec. 6, Chap. V of the same Article provides that the Chief of Police may detail, for detective duty, such men of the Department as he may select, not to exceed twenty-five, and that such men so detailed shall be known and ranked as Detective Sergeants. These men are all subject to reassignment by the Chief at his pleasure. They have no permanency in office as one who is appointed to the rank of Sergeant. Furthermore they do not lose the rank which they formerly held. That is to say that if a corporal is detailed for detective duties he assumes such duties without any loss of his former standing as a corporal. It is not necessary for him to take a leave of absence to protect his claim to the former position.

It is well settled, under our Charter, that one may not hold more than one office either under the city government or under the city and other public corporation. The office of policeman is an office within the meaning of Section 4, Article XVI of the Charter. Where a person holding one office accepts appointment to another under our Charter it amounts to a resignation of the former.

If he were to assume, therefore, that a member of the Department obtained a separate rank and office when he was detailed to perform detective duties he would be in the position of holding two offices at the same time and though he would draw the salary of but one he would have to preserve his title to both in order that he may regain his former position when the Chief of Police ordered his assignment.

The detail of members for detective duties confers upon them merely a temporary employment and a temporary title to detective sergeant without any change in rank or office. The member's rank is the rank which he held prior to his detail for detective duties.

In accordance with these views you are advised that where a member of the Department is to be retired under the circumstances stated in your communication he should be retired upon one-half of the salary attached to the rank of policeman and not upon the basis of the salary of a detective sergeant.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

**Section 273h Penal Code—County Receiving Work From an
Imprisoned Person Whose Wife and Child are Destitute
Claim against City for \$1.50 per day, Valid.**

November 27th, 1911.

Gentlemen: I am in receipt of your communication dated September 8th, 1911, stating that a claim has been filed with the Board of Supervisors based on the facts set forth in a communication from J. C. Astredo, Probation Officer, which reads as follows:

“I beg to advise that on August 22nd, 1911, Hon B. V. Sargent, sitting for Judge Cabaniss, Department 12, Superior Court, committed James J. Coggins to the County Jail for the term of 90 days and further directed the Probation Officer of said City and County to collect from said City and County the sum of \$1.50 for each working day during the term of commitment and to pay over the same to the wife of said Coggins for the support of herself and her children. I beg to advise that on August 22nd, 1911, said Coggins was delivered to the Sheriff of said City and County and started to serve the sentence imposed by Judge Sargent. Permit me to advise that the above order was made under an act of the Legislature, approved April 6th, 1911, and more particularly known as Section 273h, Chapter 379. Trusting that your Honorable body will advise me how I may carry out the instructions of the Honorable Court in securing for the wife and children of said Coggins the money ordered paid, I beg to remain, etc.”

Section 273h referred to in the communication reads as follows:

“In all prosecutions under the provisions of either section 270 or section 270a, or section 270b, or section 271 or section 271a of this code where a conviction is had and sentence of imprisonment in the county jail is imposed, the court may direct that the person so convicted shall be compelled to work upon the public roads or highways, or any other public work,

in the county where such conviction is had, during the term of such sentence. And it shall be the duty of the Board of Supervisors of the county where such conviction and sentence are had and where such work is performed by a person under sentence to the county jail, to allow and order the payment out of any fund available to the wife, or to the guardian, or to the custodian of a child or children, or to an organization, or to an individual appointed by the court as trustee, at the end of each calendar month, for the support of such wife, child or children, a sum not to exceed one and fifty one-hundredths dollars for each day's work of such person."

Sections 270, 270a and 271a of the Penal Code make it a crime for a parent to wilfully omit providing his children with necessary food, clothing or shelter or for a husband to wilfully abandon and leave his wife in a destitute condition or to refuse or neglect to provide his wife with the necessary food, clothing, shelter or proper medical attendance. As clearly appears from Section 273h of the Penal Code the Legislature intended by passing this section to provide for the sustenance of a wife or child who by the wilfull act of the husband or father has been left in a destitute condition. This is done by providing that, as a part of the sentence, if the offender is imprisoned in the County Jail, he shall be put at work upon the county road and the county shall pay to the wife or child a sum not to exceed \$1.50 per day. The reason for this is that the county is receiving work from the imprisoned person.

I am of the opinion that it is proper for the legislature to do this and that the act does not violate any constitutional inhibition. The act cannot be said to be special or class legislation for the reason that the act relates to a sentence of a particular class of offenders and all crimes necessarily fall into different classes. Consequently the punishment that is imposed upon each individual class of offenders must relate to each particular class. The act cannot be said to be a gift of public money, first, for the reason that the county is receiving a consideration in the form of work done by the im-

prisoned offender and secondly, the city has the right to provide for the sustenance of people or minor children in destitute circumstances.

It is within the power of the legislature to impose the duty upon the Board of Supervisors of the City of making this expenditure of public funds, for, as laid down in *Nichols vs. Koster*, 157 Cal., 416, the legislature of the State has power to enact general laws affecting the government of counties and the City of San Francisco is a dual government, namely, a city and county government. The act in question affects San Francisco in its character as a county.

I therefore advise you that in my judgment the claim is a valid claim against the City and County.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

City Leases Certain of its Real Property—Lessee is not Liable for Street Assessment Work Unless a Provision is Contained in the Lease to that Effect.

November 29th, 1911.

Gentlemen: I am in receipt of your communication of the 6th inst., as follows:

“The Board of Public Works awarded a contract for the paving and curbing of the roadway of Pinckney Alley between Broadway and Vallejo Streets, to Flinn & Treacy, and after completion of the work issued an assessment therefor.

The City owns the northeasterly corner of Pinkney Alley, and Broadway, fronting 137 ft. 6 inches on Pinkney Alley, and the assessment against this particular piece of property is \$649.50.

As this property has been leased to the Broadway Realty Company, this Board desires to be advised as to whether this

Company or the City and County is liable for this street work."

Opinion.

Section 8, Chapter II, Article VI of the Charter provides that the expense of the work and improvements done upon any part of said streets (having reference to the streets, lanes, etc., as defined in Section 1 of said Chapter and Article) under the order of the Board of Supervisors, shall be borne and paid for as follows:

"First:—The City and County shall pay out of the General Fund the expense; * * *

b. Of all work done in front of, or that may be assessed to, property owned by the City and County or of any Department thereof."

It will be seen from the foregoing that the City and County of San Francisco is liable for the cost and expense of the work or improvement done in front of the property mentioned in your communication. The City can only be relieved from that obligation in this particular case by some agreement contained in the lease between the City and County and the Broadway Realty Company whereby the said Realty Company assumes the obligation of paying for said work.

I have investigated the conditions of the lease referred to and find that there is nothing therein obligating said Realty Company to pay for said street work.

Respectfully;

PERCY V. LONG,
City Attorney.

Board of Public Works.

Ordinance No. 621—Electrically Illuminated Signs — Guy Wires Must be Properly Insulated—Improper Permit Should be Revoked.

November 29th, 1911.

Gentlemen: I am in receipt of your communication requesting me to advise you whether or not the construction of "The Sperry Flour Sign" is in accordance with the Ordinance of the City and County of San Francisco. You state:

"The electric wires supplying current to the lamps of the sign, (as well as the lamps and letters themselves) are supported on wooden poles of the same character as are used throughout the City for the support of wires carrying electric current.

These poles are held firmly in position braced against wind by about fifty guy wires, which extend from a point near the tops of the poles on one end to the ground on the other.

These guy wires and cables have not been equipped with insulators as required by par. e, section 1 of Ord. No. 621, and I would respectfully request your opinion as to whether or not the provisions of ordinance 621 are applicable in this case."

Sub E of Sec. 1 of Ordinance No. 621 is as follows:

"No commission, officer, agent or employee of the City and County of San Francisco shall, nor shall any person, partnership or corporation whomsoever: * * *

(e) Run, place, erect or maintain in the said City and County any 'guy' wire or 'guy' cable attached to any pole or appliance to which is attached any wire or cable used to conduct or carry electricity, without causing said 'guy' wire or 'guy' cable to be effectively insulated at all times at distance of not less than four (4) feet nor more than eight (8) feet (measured along the line of said wire or cable) from each end thereof.

This Ordinance is mandatory and is general in its terms, no exceptions are contained in it which would exempt a sign

of the character of the "Sperry Flour Sign". I know of no other ordinance which relieves the people owning the sign from complying with the provisions of Ordinance No. 621, quoted above.

I advise you therefore, that the sign comes within the provisions of Sub e, Sec. 1 of Ordinance 621 and that if a permit has been issued to erect the sign in the manner in which it has been erected the permit was improperly granted and should be revoked.

Respectfully,

PERCY V. LONG,

City Attorney.

Department of Electricity.

**Buildings Erected in Jefferson Park Should be Primarily
Designed for Convenience of Visitors—Other Use There-
of Must be Purely Incidental.**

December 2nd, 1911.

Gentlemen: I am in receipt of your communication under date of November 3rd, as follows:

"The Board of Park Commissioners of the City and County of San Francisco submit to you the following question and ask that you advise that Board thereon:

Query: The City and County of San Francisco, and the Fire Department, thereof particularly, are desirous of erecting at Jefferson Square in the vicinity of Turk and Octavia Streets a fire alarm and central station two stories in height, and with a ground floor plan of about 80 feet by 50 feet, and with provision for a driveway connected therewith, part of the basement floor plan to be utilized as a convenience station for men and women.

The contention of some of the members of the Board of Park Commissioners has been that under the Charter no building can be constructed within any of the parks, squares,

avenues or grounds dedicated to the public for park purposes, except for park pleasure purposes only.

The contention of the Fire Department is that this property belongs to the city and can be utilized by the city in this particular case for the purpose suggested.

Some of the Park Commissioners are of the opinion that Jefferson Square was deeded to the City of San Francisco for park purposes, with the reservation in the event that it was used for any other purpose, and the recollection of the Commissioners is that the property came from a man named Hayes.

Query: Can said part or any part of Jefferson Park be utilized for any other than park and pleasure purposes; and is this fire patrol station within the inhibition against buildings except for park and pleasure purposes being erected and maintained in any park or square.

Opinion.

Jefferson square became a public park the property of the City and County of San Francisco by reason of a reservation made in the Van Ness Ordinance pursuant to a report made by commissioners appointed to make reservations from public lands for the use of the City and County of San Francisco. The Van Ness Ordinance was passed in 1855 and approved by the Legislature in 1858, and ever since that time Jefferson square has been a public park in the City and County of San Francisco and under the jurisdiction of the Park Commissioners.

The query propounded to me by your body has been in part answered by an opinion rendered the Park Commissioners under date of April 30th, 1909, to be found at page 353 of the Opinions of City Attorney Long. In that opinion is found the following language which is apt at this time:

“This states the general rule which would prevent the City, as such, from using any portion of Golden Gate Park for purely administrative purposes by any of its departments

other than for park purposes. This does not, however, prevent the Park Commissioners from placing such buildings upon the Park for the purpose of properly insuring the enjoyment of those who may visit the Park, providing that such buildings in no way interfere with the enjoyment of visitors nor in any way mar the beauty of the Park as a pleasure ground."

You are therefore advised that if the construction of such a building as is contemplated in no wise interferes with the enjoyment of the Park by the people and such a building is constructed according to the designs and with the approval of the Park Commissioners to be used for park purposes and the enjoyment and care of visitors to the park then the question of whether the installation of devices which might aid in putting out fires or giving alarms would interfere with the enjoyment and use of such a building is a question of fact to be decided by your Board. You must keep in mind always that such a building should be primarily designed for the use of visitors to the park and that its use by the Fire Department must be purely incidental.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Park Commissioners.

New Bond by Home Telephone Company—Resolution Cancelling Old and Approving New Bond Must be Approved by Supervisors, Not by Mayor.

December 8th, 1911.

Gentlemen: I am in receipt of your communication of December 2nd, wherein you ask to be advised as to the form of the resolution which should be passed by your Board providing for the cancellation of the bond filed by the Bay Cities

Home Telephone Company to insure the full observance, fulfillment and performance of the terms and conditions of its franchise.

The main objection to the resolution as presented by you is that it provides for the approval of the new bond by the Mayor only, whereas the Act of March 20, 1907 (Statutes of 1907, page 747), under which this cancellation is made, it is required that the new bond which is substituted for the old must be approved by the legislative or governing body of the City.

I have accordingly prepared a new resolution which I believe meets all of the objections and is sufficient for your purposes. This resolution is enclosed herewith.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Money Borrowed from "Robinson Bequest Fund"—Effect of Constitutional Amendment as to a Mortgage Tax.

December 11th, 1911.

Gentlemen: I am in receipt of your communication of the 29th ult., enclosing protest of O. D. Baldwin to the payment of taxes for the fiscal year 1911, on lot on the easterly line of Stockton Street 82 feet 6 inches southerly from the southerly line of O'Farrell Street; thence southerly 30 feet by a uniform depth of 75 feet. The grounds of protest set forth by Mr. Baldwin are briefly these: That he borrowed the sum of \$40,000, money belonging to the "Robinson Bequest Fund," for four years, on the 28th day of September, 1909, and executed a note and mortgage on the above described real property to secure the payment of the said sum, with the interest thereon at the rate of 5% per annum; that at the date of

the execution of said note and mortgage, Section 1 of Article XIII of the Constitution provided:

“All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word ‘property’, as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State.” (Amendment adopted November 6, 1894.)

That on the 8th day of November, 1910, the people of the State of California amended said section so as to read as follows:

“All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word ‘property’, as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that a mortgage, deed of trust, contract or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation.

* * * * *

That the effect of said amendment cast upon him, as mortgagor, the additional burden of paying the taxes upon said sum of \$40,000, and that the payment of said tax was not

taken into consideration by either party at the execution of said note and mortgage, nor at the time when he bid 5% per annum interest in response to the advertisement offering to loan said amount to the person who would pay the highest rate of interest per annum for the use thereof.

In my opinion the contention of the protestant is sound. At the time of the making of said loan it was contemplated, in accordance with the constitutional provision, that the City and County of San Francisco would pay the mortgage tax on said property; the amendment relieved the City and County of San Francisco of said payment and cast upon the mortgagor the obligation of paying the same. The effect of the amendment is to compel Mr. Baldwin to pay a greater sum per annum, interest, for the use of said money; something he did not agree to when he submitted his bid in response to said advertisement.

The City and County of San Francisco cannot take advantage of the change in the said constitutional provision and exact from Mr. Baldwin any greater sum than it agreed to and did accept. As a matter of law, eliminating entirely the question of equity, the City and County of San Francisco cannot divest itself of the obligation to pay the mortgage tax imposed by the law as it existed at the time of the execution of the mortgage.

There are two methods by which Mr. Baldwin may be relieved of the obligation imposed upon him by the amendment: first, a reduction in the rate of interest to be paid by him annually to correspond with the amount of taxation; second, that Mr. Baldwin pay the taxes, as he did in this instance, and the City and County refund the same to him.

Under the circumstances, and considering the fact that the Mayor and Board of Supervisors act as trustees for the fund, and that advertisements offering the money in said fund to borrowers who would pay the highest rate of interest per annum, are necessary before the money can be loaned, the second method of adjustment suggested herein, is probably the best to be pursued.

In my opinion the Board of Supervisors should refund to Mr. Baldwin the sum of Four Hundred and Ten (\$410.00) dollars and proceed in subsequent matters of the same nature in connection with the subject matter hereof, in the manner indicated.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Majority of Board of Public Works Awards a Contract to the Highest Bidder—It is not Obligatory on a Dissenting Member of the Board to Sign the Contract, there being Lower Bids.

December 12th, 1911.

Gentlemen: I am in receipt of a communication from your President, dated December 8, 1911, requesting advice upon the following facts: On September 8, 1911, the Board of Supervisors passed an Ordinance entitled "Bill No. 1857, Ordinance No. 1660 (New Series)" authorizing the Board of Public Works to enter into contracts for the furnishing and delivery of street cars for the Geary Street municipal railroad, in accordance with the plans and specifications of said Board, and to expend therefor a sum not to exceed \$350,000 out of the Geary Street construction fund, issue of July 1, 1910, and authorizing progressive payments to be made during the progress of the street work." Pursuant to said Ordinance the Board of Public Works on October 16, 1911, caused notice to be posted and published, as required by the Charter, inviting sealed proposals for the furnishing and delivery of the said cars referred to in said Ordinance. At the time mentioned in said notice inviting proposals four sealed proposals were received by the Board. Upon the 5th day of December, 1911, final action was taken by the Board upon the proposals submitted. On motion of Commissioner Laumeister, seconded by Commissioner Newsom, a resolution was passed awarding the

contract for the street cars and trucks to the W. L. Holman Company, a corporation, for the prices mentioned in its proposal, aggregating the sum of \$337,221. Said resolution was passed by the affirmative votes of said Commissioners Lau-meister and Newsom, Commissioner Casey recording his vote in the negative. I am requested by Commissioner Casey to advise him whether it is legally obligatory upon him to sign a contract with said Holman Company, pursuant to said award.

Opinion.

I have examined carefully the four proposals with their accompanying communications. The proposal of the Pierson, Roeding & Co. did not appear to have been attached to a copy of the specifications. That bid, however, does not enter into consideration for the reason that it was the highest bid submitted. The bids of the three other bidders were as follows:

Jewett Car Company	\$287,182
McGuire-Cummings Manufacturing Co.	312,635
W. L. Holman Company	337,231

It thus appears that in point of price the bid of the Jewett Car Company was lower than that of the McGuire-Cummings Manufacturing Co. by \$25,453, and lower than that of the W. L. Holman Company by \$50,049.

In my opinion, all three of these proposals were regular bids. Each bidder fully complied with all Charter provisions and with the instructions for bidders issued by the Board.

Among the instructions issued by the Board is the following: "Each bidder is required to file with his proposal the necessary drawings to clearly indicate to the Board of Public Works the details of the construction of the cars he proposes to furnish and no proposal or bid will be received or considered by the Board of Public Works unless accompanied by these drawings." This requirement was met by the three bidders. Whether or not the drawings fully meet the specifications I am unable to determine but whether they do or not, in my opinion, it makes no difference. In this connection your attention is

called to the provision of the specifications found on page seven which reads as follows:

“The successful bidder, before commencing the work, shall furnish the City with four (4) complete sets of brown line prints of full working and detailed drawings of the street cars he proposes to furnish. All drawings shall be of uniform sizes and not larger than forty (40) inches long by thirty (30) inches wide, outside dimensions. Each drawing shall have a suitable title for identification on the lower right hand corner of the sheet. All working or detailed drawings must be presented by the Contractor and approved by the Board of Public Works before the work which they cover is begun. The approval by the Board of Public Works will, however, not relieve the Contractor of any of the requirements of these specifications. It is distinctly understood that the approval of these drawings by the Board of Public Works is intended to refer to general design only and shall not in any way relieve the Contractor of his responsibility for the correct proportioning of the various parts of the work or for any defects in their constructions, which may develop before the completion of the contract.”

The purpose of these drawings is merely to place in the hands of the Board of Public Works the general plan for the construction of the cars and the instruction referred to, requiring bidders to furnish and submit drawings with their bids, must be taken in connection with the provision of the specifications found on page seven. If the drawings do not entirely meet with the specifications, the successful bidder in executing the contract required of him will be compelled, under the terms of that contract, to make his drawings meet in every respect the specifications. That contract will provide specifically just what he is required to do and by the terms of his agreement he will not be able to deviate from the specifications.

The instructions issued by the Board further required the following: “Each bidder shall furnish with his bid a statement of the guaranteed weight of each car completely equip-

ped, and it has been assumed that in determining the capacity of motor equipment that this weight will not exceed 50,000 lbs." Each of the three bidders furnished this statement. The weight of the Holman car was guaranteed to be 53,685; the Jewett Car, 46,000 lbs., and the McGuire-Cummings car 51,000 lbs. The Holman cars, therefore, exceed the assumed weight of the cars. The language of the instructions, however, would not limit the weight of the cars to less than 53,000 lbs. and I find nothing in the specifications which would so limit their weight. The fact that the guaranteed weight of the Holman cars exceeds the maximum assumed weight I do not consider invalidates the bid of the Holman Company.

In view of the foregoing it appears that the Jewett bid was the lowest regular bid, the McGuire-Cummings Manufacturing Company the next lowest bid and the Holman bid the highest regular bid of the three.

Section 17, Chapter I, Article VI of the Charter provides:

"On the day and at the hour specified in said notice inviting sealed proposals the Board shall assemble and remain in session for at least one hour, and all bids shall be delivered to the Board while it is so in session, and within the hour named in the advertisement. No bid not so delivered to the Board shall be considered. Each bid as it shall be received shall be numbered and marked "filed" by the President and authenticated by his signature. At the expiration of the hour stated in the advertisement within which bids will be received, the Board shall, in open session, open, examine and publicly declare the same, and an abstract of each bid shall be recorded in the minutes of the Board by the Secretary. Before adjourning, the Board shall compare the bids with the record made by the Secretary, and shall thereupon, at said time, or at such other time, not exceeding twenty days thereafter, as the Board may adjourn to, award the contract to the lowest bidder, except as otherwise herein provided. Notice of such award shall forthwith be posted for five days by the Secretary of the Board in some conspicuous place in the office of the Board, and be published for the same period of time.

The Board may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract with the City and County, and all bids other than the lowest regular bid; and on accepting said lowest bid, shall thereupon return to the proper parties the checks corresponding to the bids so rejected. If all the bids are rejected, the Board shall return all the checks to the proper parties and again invite sealed proposals as in the first instance."

The three bids submitted all being regular bids *the Charter has determined* to which bidder the contract must be given, the words of the section just quoted being mandatory.

The provision of Section 17 that "the Board may reject any and all bids," does not permit the Board to reject the lowest regular bid and award the contract to the highest bidder, because that clause of the section is followed by the words "and *must* reject * * * all bids other than the lowest regular bid."

If a bid is rejected because it is irregular, notwithstanding that it is the lowest bid, then the Board has power to award the contract to the lowest bidder who has submitted a regular bid, for the reason that the bidder in submitting an irregular bid is considered as not having submitted a bid at all. When, however, the lowest regular bid is rejected all other bids must be rejected for the reason that the section of the Charter quoted requires the rejection of all bids, other than the lowest regular bid.

Whether the bid is a regular bid is a matter for determination by the Board. Ordinarily when a Board has exercised a determination which has been given it by law to determine that determination is a final one and cannot be controlled or set aside. A discretion thus given, however, cannot be exercised arbitrarily or unreasonably. When an act to be done is certain, definite and fixed there is no room for a discretion. Such an act must be done in accordance with the prescribed rules of the law.

After a careful examination of the specifications and all of the bids submitted I can see no ground or possible ground for

holding that the Jewett Company bid and the McGuire-Cummings Manufacturing Company bid are irregular. A determination by the Board that either of these two bids is irregular would not be a valid determination and would be contrary to the plain facts and the express law of the case.

I therefore advise you that it was the duty of the Board of Public Works to have rejected the Holman Company's bid and the McGuire-Cummings Manufacturing Company's bid and to have awarded the contract to the lowest regular bidder, viz., the Jewett Company or else to have rejected all bids submitted.

In the case of *Zottman vs. City and County of San Francisco*, 20 Cal., 96, it was held that a municipality, even retroactively, could not ratify a contract which had been entered into under the Charter of the municipality which authorized the contract to be given only to the lowest bidder and which had been given to a person other than the lowest bidder. In that case Justice Field laid down the rule, which has since become axiomatic, that "the mode constitutes the measure of the power". Aside from the mode designated, there is an entire absence of all power on the subject. The *Zottman* case has been followed over and over again in subsequent cases. Consequently a contract entered into with the Holman Company would be void for the reason that the Board did not let the contract in the mode designated by the Charter.

Section 21, Chapter I, Article VI, of the Charter, provides that "every contract entered into by the Board shall be signed by all the members thereof and by the other contracting party". Unless otherwise provided by the law, the action of a Board composed of more than one member is determined by the majority of its members. A decision, therefore, rightfully exercised and given is binding upon all the members of that Board and constitutes the action of the Board. If the bids of the Jewett Car Company and the McGuire-Cummings Manufacturing Company had been properly rejected by the Board, it would be the duty of Commissioner Casey to sign the contract. A majority vote

of the Board having determined its action, it would have become the duty of each member of the Board to place in operation that action. The law, however, does not require a person or a member of a Board to do an unlawful or a void act. As already shown, the awarding of the contract to the Holman Company was contrary to the provisions of the Charter and therefore void. The law, then, does not require Commissioner Casey to sign the contract under the provisions of the Charter requiring all members of the Commission to sign, for the reason, already stated, that the law does not require the doing of something which would be illegal or void.

I, therefore, advise you that under the law it is not obligatory upon Commissioner Casey to sign a contract with the Holman Company pursuant to the said award made to that Company.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Age Limit Prescribed by Charter Applicable to Uniformed Force of the Police Department—Not Applicable to Hostlers and Matrons.

December 13th, 1911.

Gentlemen: I have your request of December 8, 1911, wherein you ask to be advised whether the provisions of Section III, Chapter I, Article VIII, of the Charter, relating to the age limit for appointment to the Police Department, applies to the positions of hostlers and matrons.

The section referred to provides:

“No person shall become a member of the Department unless he shall be a citizen of the United States, of good character for honesty and sobriety, able to read and write the English language, and a resident of the City and County

for at least five years next preceding his appointment. Every appointee to the Department shall be not less than twenty-one nor more than thirty-five years of age, must possess the physical qualifications required for recruits of the United States Army, and before his appointment must pass a satisfactory medical examination under such rules and regulations as may be prescribed by the Board of Police Commissioners. In making appointments of members of the Department, the Board shall never regard the political or religious preferences or affiliations of any candidate."

From a reading of the entire section, it is evident that the qualifications were intended to apply to the uniform force of the Police Department, or to all persons who were required to perform police duty, or who could be called upon for such purpose in cases of emergency.

Manifestly, these would not apply to a matron of the prison, to a nurse called in to care for invalid or sick prisoners, or to other employment in and about the prisons and police stations.

As to hostlers, if the appointment is made from a Civil Service list of police hostlers, where the qualifications named in the section referred to were required before the examination, and where the appointee was subject to call for police duty and entitled to participate in examinations for promotion in the Department, then the limitations of the section might be enforced; but where no such list has been created, but the appointments are made from the Civil Service list of hostlers for all departments, then such limitations do not apply.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Specifications for Lease of Certain Real Property of School Department—Advertisement for Bids Must Appear 60 Days in Each Issue of the Paper.

December 14th, 1911.

Gentlemen: I am in receipt of your communication of the 7th inst., containing inquiries as to the form of specifications for the information of intending bidders for the lease of certain real property in 100 Vara Block No. 348, belonging to the School Department, and also as to whether the provisions of Sub. 11, Sec. 1, Art. VII, of the Charter, requiring advertisements for bids for the lease of said property for at least sixty days in the official newspaper and one other newspaper of general circulation, meant that the advertisement should appear in each issue or whether a once a week insertion would be sufficient.

As to the specifications, I will say that they are sufficient without any change or alteration except in one particular, and that is that you designate ten days as the time within which the bidder to whom the lease is awarded shall sign the required lease. Sec. 2, Chap. III, Art. II, of the Charter, refers to Section 1 of Chap. III, Art. II, making the provisions of the latter section applicable to contracts made and entered into by the Board of Education. Sub. 3 of said Sec. 1, Chap. III, Art. II, provides that if the bidder to whom the contract is awarded shall for five days after such award fail or neglect to enter into the contract or to file the required bond, the clerk shall draw the money due on such certificate of deposit or check and pay the same into the Treasury. I would suggest that the specifications be amended to conform with the Charter provision and that five days be inserted in lieu of ten days.

In the matter of advertising for bids, it is my opinion that the language used in Sub. 11, Chapter III, Art. VII of the Charter is not susceptible of being construed to mean anything else than that the publication must appear in each issue

of the newspapers designated for at least sixty days, and not once a week for that period of time.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

**Certain Sanitary Inspectors Appointed by Board of Health
Not Subject to Civil Service Regulations.**

December 16th, 1911.

Gentlemen: I am in receipt of your request of the 5th inst., in which you ask my opinion as to the Civil Service status of certain sanitary inspectors who are working under the active control and subject to the order of the United States Public Health and Marine Hospital Service, but who are appointed by the Board of Health of this City and County and whose salaries are paid by the City and County.

These men have been up to date subject to removal by the United States Federal authorities and take all of their orders and directions from said authorities. They have never been considered as subject to the Civil Service Chapter of our Charter, and you now ask advice as to whether these appointments, being made by the local Board of Health and the salaries paid out of the Treasury of the City and County, should be made from an eligible list of sanitary inspectors which has been made up by your Commission.

Opinion.

A proper understanding of this matter requires a brief consideration of the history of the campaign carried on for the eradication and destruction of rats in San Francisco on account of the prevalence in this City of certain cases of bubonic plague and the spread of that disease at this port.

Bubonic plague appeared in San Francisco in May, 1907, and in September, 1907, Mayor Taylor appealed to the President of the United States, Theodore Roosevelt, for help. President Roosevelt directed Surgeon General Walter Wyman of the United States Public Health and Marine Hospital Service to take charge of the situation, and Dr. Wyman ordered Passed Assistant Surgeon Rupert Blue to assume command in San Francisco, which was done, several assistants in this service being provided by the Federal Government for Dr. Blue.

It was quickly ascertained that there was grave danger of a spread of this dread disease of bubonic plague in San Francisco, which in turn might, of course, rapidly spread throughout the country, and it was soon determined that the only proper way to remove the danger was to eradicate rats, which spread the disease.

The Federal, State and City and County Governments all helped in the providing of funds for this work, but it was soon seen that the tremendous cost required for successful work made necessary additional subscriptions of a private nature, and looking to this end, a Citizens' Health Committee was appointed by Mayor Taylor on January 28, 1908. In November of 1907, Dr. Blue had reported that the expenses of these anti-plague operations in San Francisco were about \$50,000 a month. Finally, the seriousness of the situation led the Citizens' Health Committee to request the Board of Supervisors to levy an additional tax of three cents on the hundred dollars outside the dollar limit; that is, an emergency tax to cover future sanitary emergencies, and this was done. The budget ordinance, No. 445, for the fiscal year 1908-9, approved June 4, 1908, referring to this item, uses this language: "For the continuation of sanitary measures under the direction of the Board of Health and of the United States Marine Hospital Service, to be paid out of the proceeds of an additional and special tax levy of three cents on each one hundred dollars of assessed valuation, etc., etc."

Here we see an express recognition, in the making up of the budget by the Board of Supervisors, of the control that the Federal Government was to have over this matter, and of the extreme emergency which required the raising of this special tax, over the dollar limit. Practically the same general language was used in the budget for 1909-10, wherein a special tax levy of one cent on each one hundred dollars assessed valuation was provided for the same purpose; and also in the budget for 1910-11, where a special tax levy of one-half cent on each one hundred dollars assessed valuation was provided for the same purpose. And in the budget for the present fiscal year, 1911-12, we find \$25,000 set aside "for the continuance of sanitary measures under the direction of the Board of Health and of the United States Marine Hospital Service."

As an example of the important part that the payroll account of this general sanitary work plays, we find, in the report of the executive committee of the Citizens' Health Committee, of February 16, 1909, an item as follows:

"Disbursements, payroll account, laborers and inspectors, \$105,628.43."

And this out of a total expenditure of \$138,943.65.

I am informed that during the past four years the Federal Government has spent close to the amount of \$1,000,000 in the work that has been done in and about San Francisco to eradicate all danger of plague, and to prevent the recurrence of this disease at this port or at any place near this City.

I am also informed that early in the year 1909, the local Board of Health asked the Federal authorities whether they could be of assistance to the Federal Government in providing sanitary inspectors. The Federal authorities replied that they would be very pleased to have this assistance, and that the appointments might be made by the local Board of Health; provided, however, that these appointees should be subject to the control of the Federal Government. The understanding was that the appointments would be made by

the Board of Health, but that the salary warrants of the appointees must be approved by the Federal Government officials, and that these appointees would be subject to removal by the Federal Government officials, and this has been the practice up to the present time.

There has been a general understanding that the Federal authorities do not wish to have any appointees working under their control and direction subject to removal by any authorities other than themselves, and that if they find there is occasion for removal, they do not desire to be handicapped in their control of this work by being compelled to meet with the Charter requirements of placing the appointees on trial before the Civil Service Commission, and making formal charges and proofs, etc., etc.

Judging from the nature of the appropriation set apart in the budget of each year, and having in mind the extreme emergency which started this work, and being further informed that there is at the present time, and probably always will be at any seaport city such as this, danger of additional outbreaks of this disease unless the necessary precautions are taken to prevent such recurrence, it is my opinion that it never was the intention of either the City or the Federal authorities to make these appointees subject to the Civil Service sections of our Charter, and it is not now the desire of any of these authorities, either local or federal, to so do. And furthermore, such appointments, so subject to control of a government other than the government of our City and County, do not come within the spirit or the letter of the Charter sections dealing with Civil Service, which have to do only with those appointees who are immediately controlled by some local government official or board.

This is made clear when we keep in mind the language used by the Board of Supervisors in Ordinance No. 450, approved June 8, 1908, determining and declaring that a great necessity existed within the City and County, and setting forth the character of such necessity and emergency, which required that the limitation of taxation contained in Section

11 of Chapter I, Article III of the Charter, be temporarily suspended, so that the rate of taxation might be increased over the dollar limit fixed by the Charter. The character of such necessity was specified as, among other things, as follows:

“That during the present fiscal year the said City and County contained a number of cases of bubonic plague and many deaths resulted therefrom, necessitating unusual expenditures for its eradication, and the necessity for such expenditures therefor will continue for the next ensuing fiscal year.”

For each succeeding year an appropriation has been made by the Supervisors for the continuance of the same general character of work which is above set forth as being required by an extreme emergency. This work, in its essence, is in reality the work of the Federal Government. This is necessarily so when it is confined to such sanitary measures in the principal port of entry of the Pacific Coast, for it is imperative that the general control over such a situation be left in the hands of a general governmental agency which has the power to exercise a jurisdiction not only over the City of San Francisco, but over the entire country, which through the geographical situation of this City, is made liable to direct injury if any such disease is not properly controlled and checked in the first port of entry. In the nature of things no local municipal government could properly safeguard the interests of the entire country, for lack of power to have its orders obeyed. It can simply co-operate with the general government in that government's efforts. The City, in fact, acts primarily as an agent for the Federal Government in this sanitary work. The character of work done by the Board of Health, which the Charter contemplates, shall be done subject to its Civil Service provisions, is local sanitary work—work which properly comes within the natural and proper sphere of a local administrative board. As pointed out above, such has not been the character of the work done by the Board of Health in this campaign to pre-

vent the spread or recurrence of bubonic plague in San Francisco.

This opinion, then, is confined to such a peculiar state of facts of work done without the scope of purely local sanitary work as is now before me for consideration.

In the case of Herbert Gunn, referred to in your communication, I am informed from the letter which you enclosed from the Board of Health, that he is a regularly licensed physician appointed to fill the chair of Tropical Medicine. I am also informed that he is not subject to Federal control. However, this appointee being a regularly licensed physician, as above stated, comes within the scope of Section 11 of Article XIII of the Charter exempting all physicians appointed by or on the Board of Health from the operation of Civil Service rules.

You are therefore advised that none of the appointees above described are subject to the Civil Service regulations of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commissioners.

Regular Members of the Fire Department, Over 35 Years of Age, May Participate in Examination of Hydrantmen.

December 22nd, 1911.

Gentlemen: I have your request to be advised as to whether regular members of the Fire Department over the age of thirty-five years may participate in the examination to be held for hydrantmen.

Section 6 of Chapter I of Article IX of the Charter provides that:

“All persons appointed to positions in the Fire Department must at the time of their appointment be citizens of

the United States, not less than twenty-one nor more than thirty-five years of age."

The question presented by your inquiry is whether under this section a regular member of the Department who has passed the age of thirty-five years is eligible to participate in an examination for another position in the same Department.

The purpose of the section appears to be to limit the age of men entering the Department. It would work a great hardship on the Department if it were to apply to promotions and I believe it should not apply to transfers from one position to another in the same Department.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

Competitive Bidding for Automobiles—Bidders May Submit Specifications Other Than Those Proposed by the Board.

December 21st, 1911.

Gentlemen: I am in receipt of your communication of December 15th, as follows:

"At a meeting of this Board, held on the 14th inst., proposals were received from a number of automobile firms for furnishing automobiles for use in this department. The bids received from two of these firms, namely, the Consolidated Motor Car Company and the Thomas B. Jeffrey Company, have caused a doubt to have arisen as to their regularity, inasmuch as they both failed to submit their figures in the space provided for that purpose in the specifications prepared by this Board, but instead they attached copies of their own specifications to those of this Board and placed their figures thereon. At the time this Board prepared its specifications objections were made to the same by some automobile dealers on the ground that certain conditions

contained therein favored one certain make of machine, and to obviate this objection the following clause was inserted in the specifications:

‘Bidders will estimate in accordance with the above specifications, or on any other machine whose parts, equipments, etc., will prove equal to and give the same satisfaction as the above.’ ”

Opinion.

I have examined the proposals of the Consolidated Motor Car Company and the Thomas B. Jeffrey Company, and in view of the clause in the specifications quoted in your request, and the fact that automobiles are of such a character that it is impossible to frame specifications which would open bidding to all manufacturers of automobiles, I am of the opinion that the proposals submitted by these two companies are proper. The clause of the specifications above referred to provides that bidders might estimate in accordance with the specifications submitted by the Board on any other machine whose parts, equipments, etc., would prove equal to and give the same satisfaction as the machine called for by the Board's specifications. A bidder bidding upon the alternative proposal, that is, offering a machine which would prove equal to the machine answering the specifications prepared by the Board, would necessarily be compelled to submit specifications other than those prepared by the Board. He, therefore, could not sign the Board's specifications and offer to sell a machine which met these specifications. In submitting his own specifications and naming the price of his machine, which would answer those specifications, he did exactly what he was called upon to do by the specifications submitted by your Board.

My opinion in this matter is confined to the circumstances of this particular case, and is not intended to cover the ordinary cases of competitive bidding.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

**Premium on Official Bonds—Certain Bonds Held Invalid as
Not Complying With the Charter or With General Law.
City Not Liable for Premium on Such Bonds.**

December 28th, 1911.

Gentlemen: I am in receipt of your communication of the 20th inst., in which you inquire whether the City and County is liable in the amount of \$264.44 for premiums claimed as due to Messrs. Billington, Hutchinson & Co., as earned premium from February 25, 1911, to October 25, 1911, eight months, and cost of cable, on bonds issued by the Excess Insurance Company and the Essex and Suffolk Equitable Insurance Society, filed on behalf of County Treasurer McDougald, as official bonds of that official.

Opinion.

Under date of October 13, 1911, I sent to your Committee a copy of an opinion which I had theretofore, under date of September 28, 1911, rendered to the Mayor, in which opinion I advised that the above bonds of the Excess Insurance Company and the Essex and Suffolk Equitable Insurance Society, so filed on behalf of the Treasurer, were not valid, as they did not comply with the requirements of the Charter of this City and County or with the general law of this State.

Referring you to said copy of said opinion so rendered to the Mayor, I therefore now advise you that said bonds, being invalid and not properly executed under the terms of our Charter and the general State law, the City and County is not liable for the amount of said claim for premiums, or for any part thereof.

You also describe a claim filed by Healy-Gale Co., in May last, in the amount of \$395.55 for six months' premium and costs, on bond issued by Lloyd of England. I am informed by the Treasurer that there is apparently some error as to this, as the only bonds so filed were those of the Excess Insurance Company and the Essex and Suffolk Equitable

Insurance Society, as above, which bonds were issued through Lloyd of England.

It might be noted, in addition, that Section 2 of Article XV of the Charter, authorizing the payment of premiums by the City and County, for certain official bonds, states as follows:

“Provided, however, that no premium or charge shall exceed one-half of one per cent per annum on the amount of such bond.”

I am informed by the Treasurer that these bonds were in the amount of \$75,000. One-half of one per cent per annum for eight months on \$75,000 is \$250, or \$14.44 less than the amount of the first above described claim.

Respectfully,

PERCY V. LONG,
City Attorney.

Finance Committee,
Board of Supervisors.

Resolution Requiring Actual Residence of Teachers Held by Supreme Court Reasonable and Valid—Court Does Not Pass Upon the Point that the Charter Provision Requiring Residence Applies to Teachers.

January 3rd, 1912.

Gentlemen: I am in receipt of your communication of December 20, 1911, as follows:

“In reply to your communication of November 23, 1911, in re Margaret M. Stuart, plaintiff, versus the Board of Education, defendant, I am directed to ask from your office an opinion as to whether or not the Supreme Court decision referred to leaves the enforcement of a rule of residence for the teachers of the department discretionary with the Board of Education.

If, in the judgment of the Board of Education, such a rule of residence is desirable, would the law governing the matter be complied with provided said rule of the Board of Education should be made to apply only to persons elected to the department subsequent to the enactment of the rule?"

The resolution of your Board of March 10, 1909, requiring an actual residence on the part of all teachers, deputies, etc., the validity of which was upheld by the Supreme Court in the Stuart case, is as follows:

"Resolved, That in compliance with the provisions of Section 2, Article 16, of the Charter of the City and County of San Francisco, all teachers, deputies, clerks, assistants or other employees in this department are required, during their respective terms of office or employment, actually to reside within the City and County of San Francisco.

Resolved, That the order made by this Board through resolution duly adopted, requiring teachers, deputies, clerks, assistants and other employees of the School Department to reside within this City and County, must be complied with previous to the opening of the fall school term, 1909."

An examination of the Court's opinion, referred to in your communication, shows that the Court, while neither distinctly holding that the public school teacher, though elected to his position or office, is within the Charter provisions requiring residence, nor that such teacher is an "officer" of the county or district within Section 996, Political Code, Subdivision 5, requiring all local officers to reside within the counties, districts, etc., in which their duties are to be performed, yet the court makes it plain that it is because of the Charter provision requiring actual residence on the part of all officers and employees and the State law provision imposing residence as to all local officers (Sec. 996, Political Code, Sub. 5), that it finds no difficulty in upholding the validity of your resolution. Upon these points the Court says:

"In view of the fact that the Charter of the City and County of San Francisco requires all of its officers, deputies,

clerks, assistants and other employees, including the members of the Board of Education itself, to be residents of the City and County, and in view of the further fact that the State law contemplates a like residence of officials within the territory where their duties are to be performed (Pol. Code, Sec. 996), it will not be said that the resolution of the Board of Education, requiring a residence of teachers within the municipality, is unreasonable. To the contrary, in contemplation of the fact that the teacher stands in loco parentis, that it may become her duty to devote her time to the welfare of individual pupils, even outside of school hours, that the hurrying for boats or trains cannot be regarded as conducive to the highest efficiency on the part of the teacher, that tardiness may result from delays or obstructions in the transportation which a non-resident teacher must use, and, finally, as has been said, that the "benefit of pupils and resulting benefits to their parents, and to the community at large, and not the benefit of teachers, is the reason for the creation and support of the public schools." (Bates vs. Board of Education, 139 Cal., 145; 72 Pac., 907.) All these and many more considerations not necessary to detail certainly make the resolution in question a reasonable exercise of the power of the Board of Education." (Stuart vs. Board of Education, 118 Pac. Rep., 713.)

The foregoing extract from the opinion supplies controlling reasons why the teacher should be looked upon as coming within the purview of the state law regarding residence.

In *Mechem on Public Officers* the public school teacher is regarded as an officer. (See *Mechem on Public Officers*, Sec. 726).

Marion v. Board of Education, 97 Cal. 609, is authority for the proposition that the teacher is an officer. That the teacher is an officer within the code provisions as to residence there seems little room for doubt, though the Court, in the *Stuart* case does not distinctly so hold. The reasons assigned by the Court in upholding the foregoing resolution make the resolution sufficiently imperative to leave but little to the discretion of the Board of Education in enforcing the rule.

Having regard to the reason, which in nearly all instances led to the removal of some teachers from the city, the conflagration of 1906, and in view of the language of your resolution granting time to non-resident teachers to come in and become inhabitants of the city, there is good reason why, as to those teachers, non-inhabitants of the City and County who have purchased a residence outside of San Francisco and who, at the time of the passage of your resolution were and now are residing in or at the same, your Board, as to such teachers, may properly extend the time within which they may come in and become inhabitants of San Francisco so as to enable them to make some disposition of their residence property before compelling them to abandon the same and take up another residence in San Francisco. All reasonable time adequate for such purpose may be given them and this office so contended in the Stuart case, in its briefs before the Supreme Court, and this contention was based upon the language of your resolution which did, under the circumstances, give some time to non-resident teachers to become inhabitants of San Francisco. Within the limits referred to above, I am of the opinion that the enforcement of your resolution is discretionary with your Board.

With reference to the second portion of your inquiry:—

A resolution of your Board as to residence of the officers and employees of your Board, to be valid should be general in its scope and character. It would hardly be said to be a reasonable resolution that permitted eleven hundred teachers to reside outside the City and County and the few who should happen to be elected within the next few years to be compelled to live within its territorial limits. Neither the charter provisions regarding residence nor the general law of the State warrant such discriminations, nor would the efficiency of the public schools be upheld or promoted thereby. It is of the essence of a resolution passed by your Board, or other governing body, that it be general in its scope and character and uniform in its effect. The resolution contemplated in the second branch of your inquiry would, under the law, be held

to be unreasonable, discriminatory and inoperative. I, therefore, answer your second inquiry in the negative.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

Bids for Automobiles—Should the Board of Fire Commissioners, in the Exercise of Its Discretion, Decide that a Higher Priced Machine Was Really the Cheaper Machine, It May So Award the Contract.

January 10, 1912.

Gentlemen: I am in receipt of your request for an opinion, as follows:

“The Board recently called for and received bids for furnishing automobiles for this department. A number of bids were received for different makes of machines varying in price from forty-two to fifty-nine hundred dollars. We would therefore respectfully request an opinion as to whether we are compelled by the provisions of the Charter to accept the lowest bid if, in our opinion, a higher priced machine is better and cheaper even at an advanced figure.”

Opinion.

The Charter section requiring the advertisement for bids and the letting of contracts to the lowest bidder in the matter of contracts made by your Board is found in Section 4 of Chapter II of Article IX of the Charter dealing with the duties of the Fire Commissioners, and reads as follows:

“The provisions of Article II of Chapter III, of the Charter in regard to the advertising for proposals, the affidavit and securing accompanying the same, the presentation and opening of proposals, the awarding of contracts and the security for the performance thereof, shall, *so far as the same can be made*

applicable, apply to all proposals and contracts made, awarded or entered into for furnishing supplies to the Fire Department."

The said provisions referred to as contained in Article II, Chapter III of the Charter, are those provisions relating to the manner of the Supervisors purchasing supplies and awarding contracts, providing that contracts made by the Supervisors must be made "with the lowest bidder offering adequate security, after publication for not less than ten days in the official newspaper," and further providing that "the award as to each article shall in all cases be made to the lowest bidder for such article."

It will be noted that such provisions are held as controlling only "so far as the same can be made applicable." It would appear that if, as you state in your request for an opinion, in the matter of purchasing an automobile for the Fire Department a higher priced machine is better and cheaper even at an advanced figure than some lower priced machine, that this would be just such a case as is contemplated when the Charter refers to cases where these provisions as to bidding, etc., are not applicable.

I assume, from your request, that there are so many considerations to be kept in mind in the purchase of such an article as a fire truck or automobile for use in the Fire Department, such as speed, endurance, consumption of fuel, weight of car, size of car, etc., that it might be well considered as being such an article as should not be made subject to the provisions of the Charter requiring the calling for bids in the matter of purchasing ordinary and usual supplies for the Department.

This is particularly true of what some of the Courts have distinguished as proprietary or patented articles. It may be of the greatest importance in the proper conduct of your Department to purchase some particular machine, covered by patent rights, which can be purchased only from some one firm which has the selling control of said machine; and if the needs of the Department demand such a particular machine which, in good faith and by the lawful use of your discretion, you

determine to be necessary for the Department, it would seem that such a purchase would come within the exceptional class of purchases that the Courts hold are not subject to such Charter provisions as contained in our Charter requiring the calling for bids, etc.

The cases on this subject are somewhat conflicting and they have been exhaustively collected and discussed by Dillon in his text on "Municipal Corporations," 5th Edition, Vol. II, pages 1199 to 1211. Dillon gives as the best considered cases, those which make the exceptions above indicated. At pages 1199-1200, he says:

"It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage, but the nature of supply requires that it be determined from inspection and test, which are made from personal examination and trial and depend upon special knowledge and judgment, or where the thing to be obtained is a monopoly, or the requirement is of personal skill or professional service, or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply. In discussing the nature of the contracts which are excepted from the operation of statutes requiring competitive bidding, the court has said that the purpose of the statute is to insure economy in the public administration, and honesty, fidelity, and good morality in the administrative officers. Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the furnishing of labor, services, property, and materials for the uses of the city. This is the only purpose of the statutes, and when this effect is given to them, nothing further is needed. But they are not to have such a construction as to defeat this purpose, to impede the usual and regular progress of the local business, or to deprive the inhabitants, even temporarily, of those things necessary and indispensable to their subsistence, their health, or the security and protection of their persons or property."

At page 1204 Dillon says:

“When the statute or charter requires that contracts for work or material shall be let by competition and after advertisement, a divergence in the views of the courts has arisen on the question whether a city can contract for the purchase or use of patented articles. In Michigan, New York, and some other States, it has been held that where the statute or charter provides that no contract shall be made by the city except with the lowest bidder after advertisement for proposals, such provision was not intended to prevent the city from taking advantage of patented articles, and does not prohibit it from contracting for the use of an article or material although the article is patented, and the patent is owned and controlled by a single person.”

And at pages 1208-9 as follows:

“Under a charter provision requiring contracts to be advertised and let by competition, similar principles apply to proprietary articles and to articles and materials controlled by practical monopolies, as are applied to patented articles and processes, and a similar divergence of view has apparently resulted. The tendency of the Courts, however, seems to be to adopt the view that in the case of articles which are a practical monopoly, or which are proprietary in their nature, and which cannot be obtained from more than one manufacturer, a municipality is not prohibited by reason of such monopoly and ownership from contracting therefor notwithstanding that the charter contemplates that there shall be competition. If, however, the article sought to be obtained is in general use and of general manufacture—e. g., vitrified brick for street paving—and it cannot be shown that there are special and peculiar reasons why the supply should be purchased from a particular manufacturer, then the weight of authority is to the view that a municipality cannot by its specifications limit the article to be furnished to those manufactured by a particular maker.”

At page 1202 he says:

“A practical monopoly of the subject matter of the contract is also regarded as furnishing a sufficient reason for an exception to a statutory requirement to advertise bids.”

You are therefore advised that if your Board, in the exercise of its lawful discretion, finds as a matter of fact, that, as you state in your communication, "a higher priced machine is better and cheaper even at an advanced figure," than a lower priced one, you may lawfully award the contract to the seller of the higher priced machine. This opinion is intended to be limited in its application to such a peculiar state of facts as you have presented to me, where we are dealing with a patented or proprietary article which your Board has found is necessary for the proper conduct of the department.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Chief of Department of Electricity Not Under Civil Service Provisions of Charter.

San Francisco, January 12th, 1912.

Gentlemen: I have your request for an opinion which reads as follows:

"The Civil Service Commission respectfully requests your opinion as to whether or not the position of Chief Electrician of the Department of Electricity is subject to the provisions of Article XIII of the Charter."

The sections of the Charter in this respect are conflicting. Section 11 of Article XIII which designates the departments and offices subject to the Civil Service provisions of the Charter does not mention the Department of Electricity.

Section 2 of Chapter IX of Article IX provides for the appointment of a Chief of the Department of Electricity and fixes his duties and compensation, but does not place him under civil service. This section was adopted with the original charter at the same time as Section 11 of Article XIII. The

intention was clear at the time of the adoption of the original charter, to exempt the Chief of this Department from the Civil Service provisions of the charter.

By the amendment to Section 3 of Chapter IX of Article IX, approved November 23rd, 1907, it was provided that

“Any person who, under a classification of positions by the Civil Service Commission has been appointed in conformity with Article XIII of this Charter and who has served the probationary period required by said Article is hereby declared appointed within the provisions of the Article XIII to said position so classified.”

Prior to this amendment the Civil Service Commission, acting upon the belief that the Department of Electricity came within the provisions of Article XIII of the Charter, had classified all the places of employment in the Department including the Chief. The amendment above referred to served to place within the Civil Service provisions of the Charter all of the persons appointed under these classifications.

In view of these facts I advised the Department of Electricity, on June 6th, 1908, that the incumbent of the office of Chief of the Department of Electricity should be considered a Civil Service officer and granted a hearing in accordance with the provisions of Article XIII of the Charter before removal.

Prior to the amendment approved November 23rd, 1907, Section 3 of Chapter IX of Article IX of the Charter provided that:

“The Joint Commission may appoint such assistants as may be necessary to keep the electric and telephone systems in working order.”

This language was changed by the amendment to read as follows:

“The Joint Commission may appoint such assistants and other employees as may be necessary to efficiently maintain, extend and repair the Department of Electricity at all times. All appointments shall be made subject to the provisions of Article XIII hereof.”

The question now is—Do the words “all appointments” in the section just quoted include the Chief of the Department?

The fact that section 2 of this chapter, which contains all the provisions relating to the Chief, has remained without amendment, and that there is no express provision in the Charter subjecting the Chief of the Department of Electricity to the Civil Service provisions of the Charter persuade me that this amendment was not intended to refer to the Chief, but that it was intended to apply only to those appointments authorized by Section 3 of the Chapter.

You are therefore advised that the position of Chief of the Department of Electricity is not subject to the Civil Service provisions of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commissioners.

Assessment for Street Improvement Is a Tax and Counter Claim Cannot Be Set Up Against It.

January 13th, 1912.

Gentlemen: I am in receipt of your communication of the 8th inst. as follows:

“You are requested to advise the Board as to the proper and legal course to pursue in the case here presented: After proceedings duly had and taken in the matter of the opening and widening of North Stanyan Street between Fulton and McAllister Streets, in conformity with the provisions of Chapter III of Article VI of the Charter, *an assessment for benefits* was levied against a lot of land owned by a Mrs. Margaret Bowman described in an accompanying copy of a communication received from her attorney, R. H. Countryman, Esq., in the fixed and determined amount of \$508.72.

Said owner was duly awarded for damages to her said lot of land and improvements thereon the sum of \$841.00. She desires to let the benefits offset the damages to the amount to which she is entitled, and to receive the balance of \$332.28 whenever the amount of the damages is payable to her in due course, as will appear from the said communication of her attorney.

The question arises, Has this Board the power, in view of the afore cited provisions of the Charter, to comply with the request of the said owner in the said matter?"

Opinion.

The inquiry propounded by your Honorable Board must be answered by reference to two sections of Chapter III, Article VI of the Charter, viz.: Section 13, providing for the payment to the Board of Public Works, of any assessment made to cover the cost of work in the particular matter referred to in your communication, and Section 15, providing for the payment, to the owner of any property damaged by reason of the said improvement of the amount of said damages, as fixed by said Board.

It will be seen that Section 13 compels the payment, to the Board of Public Works, of all assessments levied and approved by the Board of Supervisors in full, without any reference to an offset for damages; said payments to be made in a specified time, which is thirty days from the date of the first publication of a notice by the Board of Public Works that it has received the assessment roll and that all sums levied and assessed in said roll are due and payable immediately and that the payment of said sums is to be made to said Board within thirty days.

Section 15 grants discretionary power to the Board of Public Works to determine the time of making payments for damages awarded to the owner of any property within the district; said discretion to be exercised when there shall be sufficient money in the hands of the Treasurer, in the particular fund, to pay said damages and the Board is authorized to draw

warrants for said payments in favor of the person entitled to the same. The said warrants must be drawn for the full amount thereof.

The method and procedure of collecting assessments and paying awards of damages, as set forth in said sections, must be strictly followed. The Board of Public Works is empowered to proceed as therein indicated, and it cannot substitute any other method for the one laid down. In other words, the Board of Public Works may not enlarge upon the powers granted to it under the Charter and is confined to a strict observance of said grant.

An assessment for opening a street is in the nature of and constitutes a tax levied by the municipality upon certain property to defray the expenses of said improvements, and no demand, or, as in this case, an award for damages, can be made as a set off against it unless expressly so authorized by statute, and we have seen that there is no such statutory or Charter authorization.

The Supreme Court in the case of *Himmelmann v. Spanagel*, 39 Cal. page 389, in deciding a case involving a claim for damages occasioned by the contractors in depositing a large quantity of earth on the premises of a property owner, assessed for the improvement of a street during the progress of the work, held that a claim of that character could not be set off against the assessment, in a suit thereon. The Court used this language in disposing of the case:

“A further, and we think, a conclusive answer to the defendants’ position, is, that the demand on which the action was brought, constitutes, according to the authority of the cases above cited, a tax—a municipal tax—levied by the corporation upon certain property, to defray the expenses of the improvement of a street adjacent to the property. The origin, obligatory force and whole nature of a tax, is such that it is impossible to conceive of a demand that might be set off against it, unless expressly so authorized by statute. No case has been cited, and probably none can be found, which authorizes a defendant, when sued for a municipal assessment or tax, to set up a counter claim.”

The principle enunciated in the Himmelmann case has been universally upheld by the Courts in other jurisdictions.

In my opinion the petitioner herein must comply with the Charter provision in the matter of paying the assessment, and you are powerless to deviate from the law as contained in the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

**Amendment of October 10, 1911, to Sec. 19, Art. XI, of
Constitution, Has Entirely Changed the Relation of the
City to Public Service Corporations Supplying Water or
Light and Thereafter Applying for Use of Streets.**

January 13th, 1912.

Gentlemen: On December 26th, 1911, the Board of Supervisors adopted Resolution No. 9159 (New Series) which reads in part as follows:

“WHEREAS, the Sierra and San Francisco Power Company have applied for a large number of pole and wire permits for the purpose of supplying power to the City and County of San Francisco and the inhabitants thereof and for other purposes, and

“WHEREAS, the City Attorney did in April 1910, render an opinion unfavorable to the right of said Sierra and San Francisco Power Company to erect poles and wires without first having a franchise therefor, and

“WHEREAS, the people of the State of California did on October 10th, 1911, amend Section 19 of Article 11, of the Constitution of the State of California so as to give the Board of Supervisors control over corporations desiring to supply light, heat or power to the inhabitants of any City,

“BE IT RESOLVED, That the Clerk of the Board of Supervisors be, and the same is hereby instructed to request the City Attorney to render an opinion as to the powers and proper procedure to be followed by this Board in view of the above amendment;

“AND BE IT FURTHER RESOLVED, That the Clerk be and the same is hereby instructed to notify the Board of Public Works and the Department of Electricity to grant no permits to the said Sierra and San Francisco Power Company for the erection of poles, the laying of conduits or the stringing of wires until further instructed by this Board.”

On the same day that the above resolution was adopted, the Board of Public Works addressed me a letter reading as follows:

“On the 10th day of October, 1911, the electors of the State of California adopted an amendment to the Constitution of the said State, which amended Section 19 of Article 11 of said Constitution, such amendment having been submitted under the designation of ‘Senate Constitutional Amendment No. 49.’

“The Sierra & San Francisco Power Company on December 21, 1911, petitioned this Board for permission to erect poles for the purpose of extending its existing lighting system along certain streets and avenues mentioned in its said petition, a copy of which petition is herewith transmitted and made a part of this communication.

“In view of the amendment above referred to, this Board desires to be advised whether the privilege of using the public streets and thoroughfares of the City and County to the extent accorded by the provisions of Section 19 of Article 11 of the Constitution as the same existed prior to the said amendment, to any individual or company duly incorporated for the purpose of supplying the City and its inhabitants with water or artificial light, has in any degree or measure been abridged, restricted or modified, in consequence of the adoption of said amendment; and, further, as to the application of the provisions of said Section 19 as now amended to any individual or

company now or hereafter desirous of supplying this City with water or artificial light in pursuance thereof, considered in connection with the existing organic law of the City and County.”

Opinion.

The opinion of April 8th, 1910, referred to in the above Resolution No. 9159, referred to an application of the Sierra and San Francisco Power Company for a permit to erect poles for the furnishing of *power* and not *light*. It was then held that Section 19 of Article XI of the Constitution granted certain rights for lighting purposes, but none for the furnishing of power; and that a franchise was necessary for the erection of poles for the furnishing of power. Inasmuch as the Constitutional section above referred to never conferred any rights as to the use of the streets for the furnishing of power, the amendment of that section does not affect the questions then discussed, and you are referred to my opinion of April 8th, 1910, as to the procedure to be followed in granting permits for the erection of poles for that purpose.

It appears, however, from the enclosure contained in the letter from the Board of Public Works that the recent application of the same company is for a permit for the erection of poles for the extension of its *lighting* system. This presents a different question from that discussed in April 1910, upon which the opinion then rendered is not controlling.

The other portions of the resolution and the letter from the Board of Public Works raise substantially the same questions and will be answered together.

Replying to the first inquiry of the Board of Public Works, permit me to advise that the privilege of using the public streets and thoroughfares of the City and County for the laying of pipes, poles and conduits for lighting and water has not only been abridged, restricted and modified by the constitutional amendment referred to, but that the relative rights of the City and the public service corporations in such streets have been placed thereby upon an entirely new basis.

Prior to October 10th, 1911, Section 19 of Article XI of the Constitution reads as follows:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The amended section adopted on October 10, 1911, and now in effect, reads as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

The purpose of this constitutional provision as originally adopted was to exempt the proprietors of the business of supplying water and light to the inhabitants of municipalities from the necessity of obtaining franchises from local authorities.

The proponents of the section based the argument for its adoption upon the necessity of free competition and prevention of monopoly in the furnishing of these necessities, without power in municipalities to limit or tax the privilege. The Supreme Court of this State has construed the section in accordance with its declared purpose, and has held, therefore, that the provisions of the section, as they existed prior to the recent amendment were self-executing and conferred upon persons or corporations who availed themselves of their privileges an absolute right to the use of the streets of the cities of the State, which right could not be abridged or denied by the cities themselves. The control of the cities over their streets for the purposes named has been held to have been limited to police regulations for safety and convenience of their inhabitants, and to regulations for protection from damages. *People vs. Stephens*, 62 Cal. 209; *In re Johnston*, 137 Cal. 115; *Denninger vs. Recorder's Court*, 145 Cal. 629; *Pereria vs. Wallace*, 129 Cal. 397; *Mutual Electric Light Co. vs. Ashworth*, 118 Cal. 1; *Merced Falls Gas, etc. Co. vs. Turner*, 2 Cal. App. 720.

The adoption of the recent amendment evidences a radical change of policy by the people of the State as to the relation between municipalities and public service corporations which might thereafter desire to occupy the streets for water or lighting pipes, poles or conduits. In 1878 when the present constitution was adopted, it was thought wise to remove the privilege, as far as possible from municipal interference. In 1911, the full control of their streets was restored to the cities, with the right to prescribe in their organic law the conditions and regulations under which such streets may be used for the future placing of water and lighting pipes, poles and conduits.

You are advised, therefore, that on October 10th, 1911, the privilege which had theretofore existed in favor of public

service corporations of the use of the streets of San Francisco, free from entire municipal control, was revoked and removed as to all persons and corporations who had not theretofore availed themselves of the provisions of the above referred to section of the Constitution.

The application of the Sierra and San Francisco Power Company presents, however, a somewhat narrower question. It appears that the application of that company is for a permit "to erect poles for the purpose of extending its existing lighting system." I understand from this statement that, prior to October 10, 1911, the petitioning company had placed poles in some of the streets of San Francisco for the purpose of supplying the inhabitants of the city with electric light; and that it now desires to extend this system by the placing of poles upon streets other than those occupied by it prior to the date mentioned.

The question presented by such facts is, therefore: What rights, if any, did a lighting company acquire in the use of the streets of San Francisco upon which it had placed no poles or conduits prior to October 10, 1911, by reason of the fact that it had established, prior to that date, a partial system for furnishing the inhabitants of the city with electric lights and had actually placed its poles or conduits on a portion of the streets?

The nature of the right acquired in the streets of a city by a water or lighting company under the provisions of the Constitution, as it existed prior to the recent amendment, is defined by the Supreme Court of this State in the case of *Stockton Gas, etc. Co. vs. San Joaquin Co.* 148 Cal. 313, (at pages 318, 319 and 321) as follows:

"The constitution extends a potential right to those enumerated in its provisions to avail themselves of the benefit of the franchise. But this general extension of the privilege does not invest individuals or corporations with the franchise in the streets of any particular city. It is only acquired when the constitutional grant is actually accepted; *when the pipes and conduits for gas or the electric poles are laid in or erected on*

the streets of the city. It is then owned by any individual or corporation doing so, as an accepted franchise under the general constitutional grant, exercised in the particular city where these applicances are laid or erected. By the provisions of the constitution all persons and all corporations organized for the purpose of supplying these necessities are given the capacity to take the franchise extended thereunder, but they do not acquire it until *they have* accepted it by proceeding to its actual exercise." * * *

"We think * * * that the franchise extended by the constitutional provision to lay pipes and conduits, or erect poles and supply the inhabitants of a city with artificial light, is an incorporeal hereditament—is real estate *in the nature of an easement* pertaining to the streets of the city in which it is exercisable; that it is inseparably annexed to the soil out of which the profit arises, and has a local situation in the place, and that place only, where the right is actually exercised." *

"From these authorities it would appear, then, that the franchise extended by the constitution is of such a character that it is indissolubly annexed to *the streets of a city in and upon which it is exercised*, and that, while an incorporeal hereditament, it is, in contemplation of law, real property, *an easement appurtenant to such streets.*"

The decision in the above case is based, in part, upon the early case of Appeal of N. B. & M. R.R. Co. 32 Cal. 512, where the following language is used with reference to the right acquired by a street railway company in certain designated streets under a franchise for the establishment and operation of a railway line.

"The interest is local—fixed to the particular land, the particular street—and cannot be enjoyed beyond, or independent of that fixed locality. It is immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and the right of the street railroad company to the exclusive control and enjoyment of its estate in the

soil of the street to the full extent of that estate, is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy his estate. The several estates are substantially of the same kind, and are of equal dignity before the law, but one is larger, more extensive than the other. Practically, they differ only in the quantity of interest, not in quality."

The above language is practically adopted in the Stockton case as applying with equal force to the constitutional franchise granted by the section under discussion. To the same effect are *Providence Gas Co. vs. Thurber*, 2 R. I. 15; 55 Am. Dec. 621; *Consolidated Gas Co. vs. Baltimore, Md.*, 1 L. R. A. (N. S.) 263, and many other cases.

The above cases further decide that the franchise acquired by acceptance of the constitutional privilege is a special franchise having a local situs, and is taxable in the city where located. (See also *Southern Pacific Co. vs. Portland* 177 Fed. 958; *Bank of California vs. San Francisco*, 142 Cal. 276.)

The acceptance of this constitutional privilege results in the formation of a contract between the State and the company so accepting, which contract and the property rights which become vested thereunder, are protected by the Federal Constitution. *Western Union vs. Hopkins*, 116 Pac. 557; *Sunset Tel. Co. vs. Pasadena*, 118 Pac. 796; *Sunset Tel. Co. vs. Pomona*, 172 Fed. 837.

No contract or property rights were acquired, however, under the former constitutional provision until and unless there had been an actual acceptance of its provisions. It was competent for the State to withdraw at any time the privilege extended under the constitution; and the only rights not affected by such withdrawal are such as had become vested by an actual acceptance of the privilege while it remained in force. *Pearsall vs. Great Northern RR. Co.*, 161 U. S. 648; 40 L. Ed. 838, and cases there cited.

From the above authorities the following legal principles are established as the law of this State:

(1) The Constitutional grant contained in Section 19, Article XI, as it existed prior to the amendment, conferred no right in the streets of the City until accepted by a corporation for the purposes therein designated.

(2) The acceptance of such privilege creates a contract, which contract cannot be impaired by a subsequent amendment to the State Constitution.

(3) Whatever rights in the streets of California municipalities became vested in public service corporations prior to October 10th, 1911, cannot be taken away or abridged (except by the proper exercise of the police power), without due compensation to the owner of such rights.

(4) The rights acquired in the streets of the city under the former constitutional section are in the nature of easements in such streets.

The only questions upon which differences of opinion can exist are three, viz:

(1) What acts of a public service corporation constitute an acceptance of the constitutional privilege;

(2) What is the nature and extent of the contract formed by such acceptance; and

(3) What rights become immediately vested by such acceptance; and particularly do these rights extend to *all* the streets of the city, or to those only which were actually occupied prior to the amendment of the constitution.

It is contended that the offer extended by the former constitutional section was for the use of *all* the streets of the city; that the beginning of a distributing system in the city in a *bona fide* attempt to establish an entire system for furnishing light, constituted an acceptance of such entire offer; that upon such acceptance a contract was created, the scope of which is measured by the terms of the offer and not by the quantum covered by the evidence of acceptance; and that, therefore, if a beginning had been made in the establishment of a lighting system in the city prior to October 10th, 1911, the corporation which had made such beginning thereby acquired a vested

right to the use of all the streets of the city, of which it could not be deprived by the constitutional amendment.

If this position is correct, any act of a public service corporation, performed prior to October 10th, 1911, either within or without the city, which evidenced a *bona fide* intent to establish a lighting system in San Francisco would, in my judgment, have had the same result. The vice in the argument is that it makes the acceptance of the constitutional privilege depend upon the *intent* of the accepting corporation rather than upon the physical act of use of the streets.

The contract between the State and a public service corporation, which is invoked for the protection of alleged vested rights, is the franchise itself. No contract is created by which the State is bound to grant a franchise in the future. No contract exists until the franchise comes into life. In the usual case of a franchise by a municipality over certain designated streets, the contract is complete upon the grant of the franchise. There is then a present, completed grant. In the case of the constitutional franchise, however, there is neither grant, franchise nor contract until the potential right is availed of. As is said by the Supreme Court in the Stockton case (*supra*), "It (the franchise) is only *acquired* when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city."

It has been held in other States, in cases involving direct grants of franchises to public service corporations for the use of certain designated streets, that a change of law as to the conditions under which such use shall be permitted cannot be applied to any of the streets so designated, even if they had not been actually used under the franchise at the time the law was changed. In cases of that character there were completed grants or franchises which conferred immediate rights for the future use of the streets named. Such completed grants or franchises could not be impaired by subsequent legislation (except in the exercise of the police power). Under our former constitutional provision there was no grant, no acquirement of

any right until there had been an acceptance *by use of the streets*. This distinction between the two classes of franchises is the reason why the decisions last above referred to are not, in my judgment, controlling upon the present inquiry.

In *Pearsall vs. Great Northern Railway* (supra), the Supreme Court of the United States adopts the following definitions of a vested right: "An immediate fixed right of present or future enjoyment." (Fearne). "An immediate right of present enjoyment, or a present fixed right of future enjoyment." (Chancellor Kent).

It is plain that no right of enjoyment of the privilege of using the streets of a city became immediate, present or fixed under the former constitutional provision until an acceptance of some character of the privileges there offered. The crux of the question is as to the nature of the acceptance necessary in order to vest a present right. In the latest cases in which the Supreme Court of this State has considered the taxation of franchises of this character it is said:

"And to the extent that the offer of the state contained in the section was accepted by a telegraph company *by actual occupation of a highway* prior to any repeal, modification or suspension of the section, no right of revocation having been reserved, such telegraph company has vested rights that cannot be taken away by State or city without compensation."

Western Union Tel. Co. vs. Hopkins, 41 Cal. Dec. 649; 116 Pac. 557; *Sunset Tel. & Tel. Co. vs. Pasadena*, 42 Cal. Dec. 598; 118 Pac. 796.

It is my opinion that under the authorities above cited, the necessary act of acceptance is the use of the streets by the placing of pipes, poles or conduits; and that the privilege can be said to have been accepted only so far as it has been used. In other words, the extent of the use of the privilege is the measure of the right conferred. The offer of the constitution was not of all the streets of the city, irrespective of use, but of those only which should be put into use by the accepting corporation. The constitutional offer was a mere license or privilege, which could have been withdrawn, until it was con-

verted into a vested franchise by use of the streets. The minds of the state and the public service corporation did not meet with regard to any particular street until the offer was accepted as to that street; hence there was no contract or franchise as to that street until that time. The right conferred by such franchise, when acquired, was in the nature of an easement in the particular streets "in and upon which it is exercised."

It follows, therefore, that the rights acquired by public service corporations in the streets of San Francisco under the provision of the Constitution as it existed prior to October 10, 1911, must be limited to those streets which had been actually occupied, prior to that date, by the placing of poles, pipes or conduits thereon. No rights were acquired as to streets not so occupied, and the constitutional privilege of their use free from municipal restrictions has now been withdrawn.

The views above expressed are strengthened by the well established rule, adopted by the Courts, that grants of the character here discussed are always to be construed in favor of the public.

The second inquiry in the resolution of the Board of Supervisors, and also in the letter from the Board of Public Works raises the question as to the effect of the provisions of the organic law of the City upon the application of "any individual or company now or hereafter desirous of supplying the city with water or artificial light." The term "organic law," as used in the present section of the constitution, includes the city charter, and also all ordinances of the city legally passed under authority conferred by the charter. (*Harrison v. Horton*, 5 Cal. App. 417 and cases there cited).

The following provisions of the San Francisco charter are to be considered in this connection:

Article II, Chapter II, Section 1:

"Subject to the provisions, limitations and restrictions in this charter contained, the Board of Supervisors shall have power; * * *

2. "Except as otherwise provided in this Charter, or in the Constitution of the State of California, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County. * * *

13. "Except as otherwise provided in this charter, to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the city and county."

Article VI, Chapter I, Section 9:

"The Board of Public Works shall have charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors;

"(1) Of all public ways, streets, avenues, lanes, alleys, places, courts, roads, highways and boulevards now open, or which may hereafter be opened in the city and county; of the manner of their use; and of all work done upon, over, or under the same; and herein particularly the Board shall have exclusive authority to prescribe rules and grant permits, in conformity with the ordinances of the Supervisors, for * * * the erection of telegraph and telephone poles and poles for electric lighting, and the laying under the surface of the streets or sidewalks of telegraph or telephone wires, and wires for electric lighting and power; * * * and without such permission in writing from said Board, no person shall do any of the acts in this section enumerated."

Article II, Chapter II, Section 7:

"The Supervisors shall have no power to grant franchises or privileges to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway of the city and county, except upon all the conditions and in the manner, including competitive bidding and payment of a percentage of gross receipts, hereinabove set out, and upon the further condition that the Board shall at all times have the right to regulate the charges of any person,

company or corporation using, enjoying or possessing such franchise or privilege.”

The conditions and manner of granting franchises is particularly set forth in Article II, Chapter II, Section 6 of the charter.

The provisions of the last section above set forth, as to the necessity of franchises for lighting purposes, were inoperative prior to the amendment of October 10, 1911, to Section 19, Article II of the Constitution, for the reason, as above stated, that the constitutional provision contained a grant of power which could not be denied or abridged by the requirement of a municipal franchise.

In the recent case of *Sunset T. & T. Co. vs. Pasadena*, 42 Cal. Dec. 593, at pages 603 and 604; 118 Pac. 796, the Supreme Court says:

“The provisions of the charter purporting to give such full control as to the use of streets for pipes and conduits for the furnishing of water and light are not effective, in view of the direct grant for those purposes made by Section 19 of Article II of the Constitution (see *In re Johnston*, 137 Cal. 115), is not a sufficient warrant for holding that it was not intended to vest such control in the city. We think it impossible to reasonably construe these provisions as purporting to authorize on the part of the city only such regulations as come within the domain of the police power.”

There can be no question but that the full control of the use of the streets of the city is now vested in the Board of Supervisors. In my opinion Section 7 of Chapter II of Article II above referred to is a valid limitation upon the exercise of power granted in other portions of the charter as to this control of the streets. The purpose of said section was to restrict the manner of the use of the power of control of streets whenever such power might be used. When the constitutional privilege of the use of streets was removed this section immediately applied to and restricted the power then restored to the municipal authorities.

You are, therefore, advised that the franchise or privilege of erecting poles or wires for lighting purposes may now be granted by the Supervisors under such conditions or regulations as such Board may by ordinance prescribe, provided, however, that such ordinances do not conflict with the provisions of Section 7, Article II, Chapter II of the Charter above referred to.

To summarize the matters discussed in the above opinion, my reply to your inquiries is as follows:

(1) The amendment of October 10th, 1911, to Section 19 of Article XI of the Constitution, has entirely changed the relations of the City to public service corporations, who might thereafter apply for the privilege of using any of the streets of the City for the installation of poles, wires, pipes, or conduits for the furnishing of water or light.

(2) A public service corporation which accepted the offer of the State contained in the section of the Constitution above referred to, prior to its amendment, by the actual occupation of any of the streets in the City, thereby acquired a vested right in the use of the streets as occupied by it, which right cannot be taken away by the State or City without compensation.

(3) The above constitutional grant conferred no right in the streets of the city in favor of any public service corporation, except in those streets actually used by it prior to the amendment of the Constitution; the extent of the use of the privilege being the measure of the right conferred.

(4) Subsequent to October 10, 1911, the Board of Supervisors had been vested with the full right of control over the unused streets of the City, and with the power, subject to the Charter provisions, of specifying conditions and regulations under which the franchise or privilege of erecting poles for lighting purposes may be obtained.

(5) This right of control must be exercised by the Board of Supervisors and by the Board of Public Works in accordance with the provisions of the Charter, and also in accord-

ance with all valid ordinances which may be enacted controlling such use.

(6) No franchise or privilege can now be granted for the use of any of the streets of San Francisco for lighting purposes except upon compliance with the provisions of Section 7, Chapter II, Article II of the Charter as to the manner of granting franchises and the conditions to be contained therein.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.
Board of Public Works.

Application for Reinstatement in Fire Department, Three Years After Resignation, Barred by Laches.

January 16th, 1912.

Gentlemen: I have your communication of January 5, 1912, wherein you ask to be advised whether your Board has jurisdiction to grant the petition of Patrick O'Connell for reinstatement in the Fire Department.

On September 8, 1911, at the request of the Grand Jury I advised that certain members of the Police and Fire Departments were illegally reinstated, because the applications made therefor had been filed more than three years after the date of resignation or dismissal. In so holding the case of Harby vs. Board of Education, 2 Cal. App., 413 was quoted in support of this view.

In accordance with the views therein expressed you are advised that you have no jurisdiction to grant this petition.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Application for Reinstatement and for Modification of Order Imposing Fine, More Than Three Years After Order of Dismissal and Order Imposing Fine, Barred by Laches.

January 16th, 1912.

Gentlemen: I have your communication of January 12, 1912, wherein you ask to be advised as to the power of your Board to grant an application for reinstatement of former Sergeant Reuben A. Wolf, who was dismissed from the Department on December 1, 1903, and to grant the application for modification of the order imposing a fine upon Officer James J. Moran, said order having been made July 8, 1904.

Both of these applications are made too late. In an opinion addressed to the Grand Jury on September 8, 1911, I advised that an application for reinstatement must be filed three years from the date that the petitioner severed his connection with the Department, either by resignation or dismissal. The case of Harby vs. Board of Education, 2 Cal. App., 418, was quoted in support of this view.

You are therefore advised that you are without power to grant either of the applications mentioned in your communication.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

What Resolutions of the Supervisors Do Not Require the Signature of the Mayor—Board May by Ordinance Delegate Authority to Committee of Board to Issue Certain Permits, Subject to Appeal to Board.

January 17th, 1912.

Gentlemen: I am in receipt of your request for an opinion under date of the twelfth instant, as follows:

“As this office is initiating a new system in the matter of adopting resolutions by the Supervisors, I would like to be advised as to what class of resolutions need not be sent to the Mayor for his approval.

I have read the opinion of former City Attorney Franklin K. Lane (pages 214-215, Lane's Opinions), which states that certain ordinances require the Mayor's approval. I would like to have you supplement this opinion by a statement of the classes of acts that do *not* require such approval.

For your convenience, I submit the following classification of the resolutions of this Board:

1. Resolutions directing the Clerk to perform some *specific* duty in the line of his official employment.
2. Resolutions of instructions to the several Committees of the Board, relating to conduct of the Board.
3. Resolutions requesting the several officers or departments of the City to furnish certain information or opinion, or calling their attention to certain matters.
4. Resolutions granting permits required by ordinance to be obtained from the Board of Supervisors.

Please indicate which, if any, of the foregoing classes must receive the Mayor's approval.

In addition to the foregoing, I would be pleased to be advised whether, by proper ordinance, the power to order the issuance of a permit (such as stable, oil storage, laundry, etc.) may be delegated to a committee of the Board of Supervisors, subject to an appeal to the Board by any dissatisfied party.”

Former City Attorney Franklin K. Lane, at pages 214-216 of his “Opinions”, which you refer to, holds that the Mayor's approval on resolutions is necessary only when said resolutions, if adopted, would be ordinances; that is to say, whenever the Board of Supervisors performs a legislative act, its action is subject to the approval of the Mayor, but that if the resolution cannot in any sense be said to be an ordinance or a legislative act of the Board, then the Mayor's approval is not

necessary. This opinion I consider to be undoubtedly correct. The distinction is well stated in the Charter, Article II, dealing with the "Legislative Department", Chapter I, Sections 8 and 9.

Section 8 reads:

"Every legislative act of the City and County shall be by ordinance. The enacting clause of every ordinance shall be in these words, 'Be it ordained by the People of the City and County of San Francisco as follows.' No ordinance shall be passed except by bill, and no bill shall be so amended as to change its original purpose."

Section 9 reads:

"No bill shall become an ordinance, or resolution be adopted, unless finally passed by a majority of all the members of the Board, and the vote be taken by ayes and noes and the names of the members voting for and against the same be entered in the Journal."

Here we see a clear distinction between an ordinance, the legislative act of the City and County, first properly introduced by a bill, and a resolution which may be adopted and have no legislative significance.

However, in subsequent sections of this same chapter and of other chapters of the charter the terms "ordinance" and "resolution" are used rather interchangeably and without this distinction being kept clearly in mind, but I think that, as former City Attorney Lane says, Section 16 of this Chapter, requiring "every bill and every resolution as hereinbefore provided," to be presented to the Mayor for his approval, applies strictly to such resolutions as may finally become an expression of the legislative will of the Board of Supervisors, in an ordinance.

Therefore you are advised that each of the four classifications of resolutions described in your communication do not require the approval of the Mayor.

It should be borne in mind, however, with reference to the class No. 4 which you describe as "Resolutions granting per-

mits required by ordinance to be obtained from the Board of Supervisors," that if the law require such a permit to be obtained "by ordinance," there might be some question as to whether such an "ordinance" must be approved by the Mayor. However, as I understand your inquiry, you have in mind some provision of the law providing that it would be unlawful for a "laundry" or "stable," etc., etc., to be operated unless a permit be obtained "from the Supervisors." Any such provision requiring a permit "from the Supervisors" would not require the passage of a formal ordinance, approved by the Mayor, inasmuch as such action taken by the Board of Supervisors in granting such permit would not be the exercising of a legislative function, but rather a function in the nature of either an executive or quasi-judicial function.

With reference to the second portion of your inquiry, I am of the opinion that it would be lawful for the Board of Supervisors to so amend any ordinance now in effect requiring the issuance of a permit from the Board of Supervisors for the conducting of any business, so as to delegate such authority to a committee of the Board subject to an appeal by any dissatisfied party.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Effect of Senate Constitutional Amendment No. 48 Validating Provisions of City Charter—What City and County Officers Subject to Civil Service Regulations.

January 18th, 1912.

Gentlemen: I have your request to be advised whether the provisions of Article XIII of the Charter now apply to the various county offices mentioned in said Article, or whether said Article requires amendment before it can apply to said county offices.

Section 11 of Article XIII of the Charter, as approved January 26, 1899, makes the Civil Service provisions of the Charter applicable to the County Clerk, the Assessor, the Tax Collector, the Sheriff, the Auditor, the Recorder, the Coroner, the Clerks and Stenographers of the Justices' and Police Courts, the Board of Public Works, the Police Department, the Fire Department, the Board of Election Commissioners, the Board of Health, and all Boards or Departments controlling public utilities. The same section exempts certain confidential positions in each of the above offices and Departments from the operation of these Civil Service provisions.

In *Kahn vs. Sutro*, 114 Cal., p. 335, the Supreme Court of this State held that the County Clerk, the Sheriff, the Recorder and the Coroner were county as distinguished from city officers.

Section 4013 of the Political Code includes the Assessor in the enumeration of county officers, and as he was not declared to be a municipal officer in *Kahn vs. Sutro*, it has been assumed that he is a county officer. For the purpose of this opinion we may follow this assumption.

In *Crowley vs. Freud*, 132 Cal., 440, the same Court held that the Civil Service provisions of the San Francisco Charter did not apply to such county officers and sustained the judgment of the trial Court restraining the municipal Civil Service Commission from certifying any persons for appointment to positions of employment under said offices.

These decisions were based upon an interpretation of Section 8½ of Article XI of the State Constitution, as adopted November 3, 1896. The portion of this section under consideration then read as follows:

“Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said Section 8 of said Article XI, to provide for the manner in which, the times at which and the terms for which the several county officers shall be elected or appointed, for their compensation, and for

the number of deputies that each shall have and the compensation payable to each of said deputies."

In interpreting this section, the Supreme Court, in the case of *Crowley vs. Freud*, *supra*, held that, as to the deputies of county officers, the section made it competent for municipal charters of consolidated cities and counties to provide for their number and compensation only, and that such charters were not authorized to provide for the qualifications of such deputies.

This decision was not based upon the broad ground of the intention of the people as expressed in the constitutional amendment to Section 8½, but the majority of the court followed strictly the specific language of the section.

It was to overcome the effect of this decision of the Supreme Court and to clearly define the intention of the people of the State that Section 8½ was amended on October 10, 1911. The portion of the section here involved now reads, by reason of this amendment, as follows:

"Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent, in any charter framed under said Section 8 of Article XI, or by amendment thereto, to provide for the manner in which, the times at which and the terms for which the several county and municipal officers and employees whose compensation is paid by such city and county, excepting judges of the Superior Court, shall be elected or appointed, and for their recall or removal, and for their compensation, and for the number of deputies, clerks and other employees, that each shall have, and for their compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. All provisions of any charter of any consolidated City and County heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid."

The question now involved is: Does the constitutional amendment of October 10, 1911, revitalize the Charter provi-

sions placing the county offices under Civil Service restrictions?

It is the general rule that where a statute is passed without constitutional authority or is repugnant to some provision of the Constitution, it is void from its passage, and its effect is the same as if it had never been passed.

In *Byrne vs. Drain*, 127 Cal., 663, the Supreme Court of this State had occasion to consider the effect of the constitutional amendment to Section 6 of Article XI of the Constitution, adopted in 1896, which inserted the words "except in municipal affairs" in that section. Prior to that amendment this section provided that all charters framed under the Constitution should be subject to and controlled by general laws. In 1889, the people of Los Angeles adopted a municipal charter which, among other things, contained a full scheme for the opening and widening of public streets. These provisions were radically in conflict with the general law for the opening and widening of public streets which was approved on March 6th, 1889, about three months after the approval of the Los Angeles Charter. The Court held that the Charter provision was valid when approved and that its operation was merely superseded by the approval of the general law later, that while the general law was in force, and in conflict with the charter, its provisions should control over the provisions of the Charter; and that this condition continued until, by the adoption of the amendment of 1896, the people removed the paramount control of the general laws in respect to municipal affairs and restored the operation of the Charter in that respect.

In *Banaz vs. Smith*, 133 Cal., 102, the same Court had occasion to consider the effect of this amendment in its relation to the operation of the so-called Vrooman Act providing for the construction of sewers in public streets. This Act was approved March 18th, 1885, the Los Angeles Charter was approved January 31st, 1889, and the Courts held that as the Charter provision relating to the construction of sewers was inconsistent with the existing general law it

was void when adopted, and that the subsequent amendment to Section 6 of Article XI of the Constitution did not operate to validate the void provisions of the Charter. In this case the Court said:

“If void from the beginning the amendment to Section 6 of Article XI of the Constitution in 1896 did not give life to such provisions. That would give the amendment the effect of enacting laws, instead of authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people, in adopting the amendment, would not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it, **unless it is expressly so provided.**

In *Fleming vs. Hance*, 153 Cal. p. 164, the Supreme Court of this State, in an opinion involving the constitutionality of the provisions in the Los Angeles Charter for Police Courts, which had been approved prior to the amendment to Section 8½ of Article XI of the Constitution said:

“Inasmuch as Section 8½ of Article XI of the Constitution authorizing the creation of Police Courts by freeholders charters, had not then been adopted, this provision was held to be inoperative (*People vs. Teal*, 85 Cal. 333). And the fact that the Constitution was subsequently amended by the addition of Section 8½ did not operate to revive or validate the charter provision which was void from its inception. (*Ex parte Sparks*, 120 Cal. 395).”

In *ex parte Sparks* (Supra) the same Court said:

“To give this amendment such effect **something must be added to its terms which would be repugnant to the natural interpretation of the law itself.**”

It was undoubtedly for the purpose of avoiding the effect of the decisions above quoted and to follow the suggestion of the Court found in **Ex Parte Sparks** (Supra) and **Banaz vs. Smith** (Supra) that something should be added to the

amendment itself to indicate the intention of the people to make its effect retroactive that the final clause was inserted in this amendment.

It cannot be said that the Legislature, in resubmitting the Constitutional Amendment of 1911 with the clause that all provisions of existing charters in accordance with the terms of the amendment were confirmed and declared valid, did not have in mind these earlier decisions. On the other hand, it appears that this clause was inserted for the purpose of overcoming the effect of these decisions and that the people, in approving the amendment, carried the same purpose. To hold otherwise would be to hold that this validating clause was of no effect whatever.

There can be no question of the power of the people by constitutional amendment to legislate for the entire State or any portion thereof. The authority given by the Constitution to the people of a municipality to adopt a charter for its own government is permissive only. All municipalities are subject to the paramount control of the Constitution and the laws governing them may be adopted as a whole by the people of the State or in such other method as the people, through their Constitution may authorize. Having this power the right to alter or amend such laws naturally follows. Therefore, though these Charter provisions relating to county officers and their employees may have been void when adopted, I am of the opinion that they were revitalized by the constitutional amendment of October 10, 1911.

This conclusion is supported by authorities of other jurisdictions and, I believe, is not contrary to any decision of our own Courts.

In *Hammond vs. Clark*, 71 S. E. Rep. 479, (Ga.), the Supreme Court of Georgia had occasion to pass upon a similar question. In that case the Legislature passed a statute providing that in counties of more than 34,000 population the judges of the Superior Court should be paid a salary of \$5,000 a year, which was \$2,000 more than the salary designated by the Constitution. In *Clark vs. Hammond*, 134 Ga.,

792, 68 S. E. 600, the Georgia Supreme Court held that this Act was unconstitutional and void. Thereafter an amendment was adopted to the Constitution of Georgia validating this Act of the Legislature.

In holding that the amendment was valid and that it served to confirm and validate the act of the Legislature as from the time of its passage and that it was not merely a permission for future legislation, the Court, in **Hammond vs. Clark**, 71 N. E. 479, said:

“The amendment revitalized the acts, established the rule for the future, and ratified what had been done in the past.”

From the foregoing it follows that the county officers mentioned in Article XIII of the Charter are now subject to the provisions of that Article, that an amendment to the Charter to that effect is not necessary, and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

The General Rule as to Dismissals by a Board is That When Jurisdiction to Dismiss is Given and No Power of Review Granted, Jurisdiction is Exhausted by a Judgment of Dismissal.

January 18th, 1912.

Gentlemen: In answer to your communication of January 12th, 1912, wherein you ask to be advised as to the power of your Board to grant the application for reinstatement of former Sergeant Reuben A. Wolf who was dismissed from the Department on December 1st, 1903, and to grant the application for modification of the order imposing a fine upon officer James J. Moran, which order was made July 8th, 1904, I advise you that you are without power to grant

either of said applications because the same were not made within the statutory time.

In order that it may not be assumed by you that the delay in the filing of the application is the only ground upon which they must be denied I now refer you to an opinion given to the Grand Jury on September 8th, 1911, wherein I advised that "where a member in the classified service has been dismissed upon charges regularly filed and heard he is not entitled to reinstatement. When the judgment of dismissal is entered by the Board or Commission conducting the trial, such judgment becomes final and cannot be made subject to a rehearing or review by the same or a subsequent Board." In support of this view the opinion of City Attorney Lane 1899-1902, page 323, United States vs. Gosson, 114 U. S. 622, and Belser vs. Hoffschneider, 104 Cal. page 461, are relied upon.

In the latter case the Supreme Court of this State said:

"The general rule is that where special jurisdiction is conferred upon a court or board to determine certain specified controversies and no provision is made for a review by such tribunal of its judgments when it has once determined the matter, its jurisdiction is exhausted."

And again, same page:

"The act being judicial, it would necessarily follow that the final judgment entered by the council could not be vacated. The procedure does not provide for granting a new trial or a rehearing."

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

**Sufficiency of Affidavit Accompanying Bid on Public Work
—the Bid is Made by J. F. O'Brien Co., the Affidavit is
by J. F. O'Brien.—Held Sufficient.**

January 19th, 1912.

Gentlemen: I am in receipt of your request of the 16th inst., as follows:

“Pursuant to prior proceedings duly had and taken, sealed proposals were received by this Board on the 5th day of January, 1912, for the construction of sewers and appurtenances in Brannan Street between First Street and The Embarcadero, etc., public work authorized by the Board of Supervisors.

Six proposals were submitted for said work, but for the purposes of this communication three only need be considered, those being as follows:

J. F. O'Brien Co., aggregating the sum of	\$32,671.25
Healy-Tibbitts Construction Company.....	32,824.50
Karl Ehrhart, aggregating the sum of.....	33,226.50

The foregoing proposals are herewith transmitted to you.

On January 8th, 1912, one of the above named bidders, Healy-Tibbitts Construction Company, petitioned this Board to disregard the bid submitted by the J. F. O'Brien Company upon the grounds specified in its petition, and to award the contract for said work to petitioner, on the claim that its bid was the lowest regular bid. Said petition accompanies this communication, and is made a part thereof.

The question presented involves the sufficiency of the affidavit made by the provisions of Section 16, Chapter I, of Article VI, of the charter, one of the essential requirements for bids for public work. The two first bidders are corporations while the third is an individual.

No objection has been raised as to the sufficiency of the affidavit of the individual bidder (Karl Ehrhart); but in the case of the two corporate bidders, a question is raised as to

the sufficiency of their affidavits. The Charter being silent as to the the method or manner by which a **corporate** bidder may make an affidavit of the essentials provided for in said Section 16, is there any procedure of general applicability prescribed by code or statute for the making of such an affidavit by a corporation?

Do the affidavits to the bids of the two named corporate bidders contain the essentials prescribed by the provisions of said Section 16?

Has this Board the power under and pursuant to the provisions of Section 24 of Article XVI, of the charter to ascertain and determine the status of an affiant who makes what purports to be an affidavit for and in behalf of a corporate bidder?

Accompanying herewith please find points and authorities submitted by Messrs. Sales & Ballentine, attorneys for J. F. O'Brien Company; also the response thereto by Mr. John Jordan, representing Healy-Tibbitts Construction Company; and an excerpt from the minutes of the J. F. O'Brien Company as to the official status of J. F. O'Brien who made one of the affidavits here in question."

The bid of J. F. O'Brien Co., opens as follows:

"Gentlemen. In compliance with the advertisement calling for proposals for the construction of an outlet sewer and appurtenances in Brannan Street, a copy of which advertisement is hereto attached, we hereby propose and agree to execute the required contract," etc. etc.; and is signed as follows: "Signed, J. F. O'Brien Co., by J. F. O'Brien, Prest." after which is included the following affidavit:

State of California,
City and County of San Francisco. }SS.

J. F. O'Brien being first duly sworn deposes and says: That **he is J. F. O'Brien**, the party making the foregoing proposal or bid; that such bid is genuine and not collusive or sham; that said bidder has not colluded, conspired, connived

or agreed directly or indirectly, with any other bidder or person to put in a sham bid, or that such other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against the City and County, or any person interested in said improvement, for himself or for any other person.

(Signed) J. F. O'Brien,

Subscribed and sworn to before me
this 5th day of January, 1912.

C. S. Laumeister,
Commissioner Board of Public Works.
City and County of San Francisco."

The above affidavit was made out on the printed form furnished by the Board of Public Works, as was the proposal. The only words written into this affidavit were first, the name "J. F. O'Brien" at the opening of the affidavit, and then after the word "That," is written in, "he is J. F. O'Brien," and after the printed word "Signed" is written "J. F. O'Brien," and then the date is filled in and the name "C. S. Laumeister" written in.

The aforesaid proposal and affidavit were made to comply with Section 16 of Chapter 1 of Article VI of the Charter which provides as follows:

"All proposals shall be made upon printed forms to be prepared by the Board, (Public Works), and furnished gratuitously upon application, with a form for the affidavit hereinafter provided for printed thereon. Each bid shall have thereon the affidavit of the bidder that such bid is genuine, and not collusive or sham; that he has not colluded, conspired, connived or agreed, directly or indirectly, with any bidder or person to put in a sham bid, or that such other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against the City and County, or any person interested in said improvement for himself or any other person. * * * Any contract made in violation of any of the foregoing provisions, and in

the case of the improvements of streets, any assessment for the work done under such contract, shall be absolutely void. All proposals offered shall be accompanied by a check, certified by a responsible bank, payable to the order of the Clerk of the Board of Supervisors, for an amount not less than ten per centum of the aggregate of the proposal, and no proposal shall be considered unless accompanied by such check.* * *

Opinion.

The above proposal in which it is stated that "we hereby propose and agree to execute the required contract," etc., etc., and is then signed, "J. F. O'Brien Co. by J. F. O'Brien," who is described in the affidavit as the party making the foregoing proposal or bid, is made unquestionably in legal form. The question then is whether the affidavit being made, in form by "J. F. O'Brien," and signed by "J. F. O'Brien," who is described in the affidavit as the "party making the foregoing proposal or bid," is made contrary to the Charter requirement that "each bid shall have thereon the affidavit **of the bidder** that such bid is genuine, and not collusive or sham; that he has not colluded, conspired, connived or agreed," etc., etc.

On December 27th, 1909, I advised your Honorable Board that a certain bid and affidavit submitted by Hansbrough Bros. Co., a corporation, in the matter of a proposed construction of a certain building in connection with the high pressure system, were not made in compliance with the above requirements of the Charter. In that case the bid read as follows:

"In compliance with the advertisement calling for proposals for the construction of a Class A building * * * **Hansbrough Bros. Company** hereby propose and agree to execute the required contract," etc., and it was signed "S. L. Hansbrough, Secty," the affidavit attached thereto read in part as follows: "S. L. Hansbrough being first duly sworn, deposes and says that **he is the party making the foregoing proposal**

or bid." Hansbrough then went on to make oath as to the matters required, as above, and the affidavit was signed "S. L. Hansbrough."

I advised your Honorable Board that since the so-called proposal was not signed by the "Hansbrough Bros., Company," but only by "S. L. Hansbrough, Secty." and since the said proposal in no way described the said company as being a corporation, or that said S. L. Hansbrough was Secretary or President, or an officer of said corporation or that he had any authority from the corporation to sign for the corporation, the signature of said Hansbrough at the end of of the proposal merely describing himself and not in any way binding the company; the proposal being in fact made by S. L. Hansbrough, Secretary, and not Hansbrough Bros., Company to do certain work; and since the affidavit described Hansbrough himself as being the bidder, that the requirement of the charter that the proposal for the work be filed by the bidder and that there be attached to the said proposal an affidavit of the bidder, as above described, had not been complied with.

It will at once be noted that there is a distinction between the Hansbrough case and the case you now ask advice on, in that in the former case the proposal was not signed properly by Hansbrough on behalf of the Hansbrough Bros. Company, while in this case the proposal for the work is properly signed by J. F. O'Brien, as president of the J. F. O'Brien Co.

The same general affidavit however, in words, is made in this case as in the former case, that is J. F. O'Brien describes himself as the bidder, just as Hansbrough in the former case described himself as the bidder, and the question for determination then is, whether the proposal in this case having been properly made, the affidavit in this case can be held valid, whereas in the Hansbrough case it was held invalid.

If, J. F. O'Brien in his affidavit had stated that he was "J. F. O'Brien, the president of the J. F. O'Brien Co., the party making the proposal, or bid," etc. etc., there is no question

but that the affidavit would have been in proper form. Does then, his omission of this statement in the affidavit that he is the president, invalidate the affidavit?

He states that he is J. F. O'Brien "the party making the foregoing proposal or bid." He thus specifically refers "to the foregoing bid," and while he incorrectly describes himself as the bidder, he does refer to a valid and legal bid signed by the J. F. O'Brien Co. He refers to the only bid that he was interested in which was before the Board of Public Works for consideration. There can be absolutely no question then that said J. F. O'Brien intended in his affidavit to say that he was the J. F. O'Brien who had signed on behalf of the J. F. O'Brien Co., a proposal or bid, as president of said company, for he refers to the "foregoing proposal or bid" specifically, and the only such proposal or bid to which he refers is the bid attached to the affidavit which was signed by himself properly as president of the J. F. O'Brien Co.

Suppose he had said in his affidavit that he was "J. F. O'Brien, the president of the J. F. O'Brien Co." and then had gone on to say "and I am the party making the foregoing proposal or bid." Would the fact that he thus described himself as being the "party making the foregoing proposal or bid" when he had already in his affidavit described himself as the president of the J. F. O'Brien Co., and the only bid set forth along with the affidavit was a bid properly signed by himself as president of the J. F. O'Brien Co., make the affidavit invalid, because of the fact that it was thus stated in said affidavit that the affidavit was made by O'Brien, as a bidder, instead of O'Brien, as President of J. F. O'Brien Co? It seems to me clear that if such were the situation that his merely describing himself in the affidavit as "a bidder" would be apparently an incorrect statement, and that the evident intention of O'Brien to sign the affidavit as president of and on behalf of the J. F. O'Brien Co., could properly be considered by your Board and the affidavit held valid.

Suppose again a stronger case. Suppose that J. F. O'Brien had stated in his affidavit that he was "J. F. O'Brien the president of the J. F. O'Brien Co.; and as such President, made the affidavit; and that the said J. F. O'Brien Co., was the party making the foregoing proposal or bid;" and then had gone on to state as follows: "that I am the party making the foregoing proposal or bid." There would be an inconsistency. First, he would state that the J. F. O'Brien Co. was the bidder, and that he was the president of the said company; then he would state that he was the bidder. It would seem the extreme of technical interpretation of the Charter Sections to hold that merely because of such inconsistent statements in his affidavit that your Board could not look to the bid itself, which was properly signed by him as president of the company, and see in that the intention of said O'Brien to sign the affidavit in behalf, not of himself as a bidder, but of the J. F. O'Brien Co., as a bidder. I take it that there can be no possible question that in such an extreme case the inconsistency and incorrect description of himself in one part of the affidavit as the bidder, could be disregarded, and the correct statement found in another portion of the affidavit describing the J. F. O'Brien Co., as the bidder be considered as the controlling statement.

Then, coming to the question here before me, we find no express statement in the affidavit by O'Brien that the J. F. O'Brien Co., was the bidder and that he was making the affidavit merely as the president of the said J. F. O'Brien Co., but it seems to me that the same principal would apply and that we must read this affidavit along with the bid itself which was properly signed, and so reading it, it is plain that the intention of said O'Brien was to sign the affidavit as president of the said company. The reason applying in the extreme example which we have suggested, it seems to me, should be applied in the case which we are considering, for if J. F. O'Brien, when he signed this affidavit, intended to sign as president of the company, and intended to make oath to the effect that the said J. F. O'Brien Co., rather than him-

self, had not colluded, conspired, connived or agreed, etc., etc., then if as a matter of fact the said J. F. O'Brien Co., had so colluded, conspired, connived or agreed, etc., etc., said J. F. O'Brien would be guilty of the making of a false oath even though in his affidavit he had incorrectly described himself as being the party who had not colluded, conspired, connived or agreed, etc., etc.

As a matter of fact J. F. O'Brien states in his affidavit, that "he is J. F. O'Brien, the party making the foregoing proposal or bid." He **was** the party who made the "bid," for the J. F. O'Brien Co., being so authorized to do. And so, in essence, he correctly states that he "made the bid." He made it, but for and on behalf of the J. F. O'Brien Co., and then, when in his affidavit he goes on to say "that said bidder has not colluded" etc., "said bidder" refers back to "J. F. O'Brien Co.," whose name is signed to the bid.

Your Board can consider the resolution of the Board of Directors of the J. F. O'Brien Co., a copy of which you submit along with your request for an opinion, which resolution is certified to by the Secretary of the J. F. O'Brien Company as having been adopted at a regular meeting of the Board of Directors by said company held on May 10th, 1911, and which resolution reads as follows:

"It was moved, seconded and carried that J. F. O'Brien, as President of the J. F. O'Brien Co., be given full power and authority to enter into, on behalf of the J. F. O'Brien Co., any and all contracts relating to construction or excavation work in the City and County of San Francisco; and that he be given full power, on behalf of said corporation to prepare and submit bids upon said kind or kinds of work."

Let us suppose that this affidavit and proposal had been made in unquestionable form by J. F. O'Brien, as president of the J. F. O'Brien Co., and that some protesting bidder or citizen should appear before your Board and allege that he was in a position to prove to your Board that the Board of Directors of the J. F. O'Brien Co., had passed a resolution on the date of the submission of the bid denying to the said J. F.

O'Brien any authority to so bid for the company or to so make affidavit for the company. Certainly your Board would be authorized to consider such proof in order to protect itself in executing a contract for said work, and in knowing that the company was properly represented in the matter of the submission of bids, etc. If then in that case your Board could look into the facts as to the authority of said J. F. O'Brien to make such proposal and such affidavit, it would seem that it would have the same authority to consider the right of said O'Brien to make affidavit and submit the bids in this case, and to look into that right with a view to determining his intention and the intention of the company in the making of this affidavit which is here in question.

In my aforesaid opinion in the Hansbrough Bros. Company case I used the following language:

"If, however, the proposal could be considered as an offer made by Hansbrough Bros. Company and binding upon Hansbrough Bros. Company the bid would still be irregular, for the reason that the affidavit required by the Charter was not annexed thereto. The Charter required an affidavit of the bidder. The affidavit attached does not purport to have been made on behalf of Hansbrough Bros. Company, a corporation, or by any person who appears to be clothed with authority to make the required affidavit for Hansbrough Bros. Company, a corporation, or by any one having authority to make a proposal for the corporation."

And I cited the case of Flinn vs. Strauss, 87 Pac. 414, to support this language of the opinion.

In the first place the above language of my former opinion was unnecessary to the conclusion reached in that opinion, for in that case the proposal had not, as a matter of fact, been properly signed by Hansbrough Bros. Company. It was signed simply "S. L. Hansbrough, Secty." When, then Hansbrough said in his affidavit that "he was the party making the foregoing bid," he stated that he, an individual, without any reference to the Hansbrough Bros. Company, had submitted a bid. We do not have the situation of our

present case, where J. F. O'Brien describes himself, in the bid, as merely President of the company.

When we consider Flinn vs. Strauss carefully we find that in that case a proposal for city work in San Francisco under the terms of these same charter sections which we are here considering purported to have been made by two persons "Flinn and Treacy," and then the affidavit was signed "James J. Flinn" and in his affidavit said Flinn stated, "that he is the party making the foregoing proposal," and the court very properly held that this statement in the affidavit by Flinn that he was the party making the proposal was at variance with the proposal itself, which purported to be made by two persons "Flinn and Treacy." Therefore, it simply amounted to a proposal being made by two individuals A and B and the affidavit signed by A, and the court held that, "The provision in the charter requiring the 'Affidavit of the bidder' is not satisfied by the affidavit of one of several bidders. The purpose of the provision is to prevent collusion and fraud and to sift the conscience of the bidder, or of all of the bidders, if there be more than one; but an affidavit of one of several bidders might be made in good faith notwithstanding a collusion on the part of one or more of his associates."

That is, the affidavit in that case on its face was made by one of these bidders, and the court held that if there are two bidders the Charter requires that each of the bidders make an affidavit because while one bidder might be acting in good faith this would not necessarily mean that the other bidder was; but in our case it appears affirmatively in the proposal itself that there is but one bidder, the J. F. O'Brien Co., and that J. F. O'Brien signed this bid on behalf of that company and there can be no question that J. F. O'Brien in signing the affidavit signed it as president of the company and intended such to be the effect of the affidavit.

I therefore do not believe that the case of Flinn vs. Strauss is in point as determining that, whereas in our case there is but one bidder, the J. F. O'Brien Co., that such an affidavit

as we here have signed by J. F. O'Brien is insufficient merely because he apparently on the face of the affidavit and proposal described himself as being the bidder under the circumstances as above described. This, it seems to me, would be applying an extremely technical interpretation of the purpose and intention of the charter sections.

I am therefore of the opinion that the affidavit signed by J. F. O'Brien in this case is a proper affidavit and meets the requirements of the charter section.

As regards the other point suggested in the protest filed with your Board which you sent with your request for an opinion, concerning the question of whether the charter requirement that "all proposals offered shall be accompanied by a check, certified by a responsible bank," is complied with by the furnishing of a cashier's check of the Anglo & London Paris National Bank, made payable to the Clerk of the Board of Supervisors and signed by the cashier of said bank, I am satisfied that such check being an order from the bank itself on its own funds substantially complies with the requirement for a certified check, for the certification of a check by the bank would simply mean an acceptance by the bank of the check and would be no greater security to the City than would be such cashier's check as was furnished

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

The Classifications Required by the Charter Cannot be Consolidated for Purposes of Examination.

January 23rd, 1912.

Gentlemen: I am in receipt of your request of January 17th, as follows:

"The Civil Service Commission respectfully requests your opinion as to whether or not it may legally consolidate exist-

ing eligible lists of various classes if, in its judgment, such consolidation would simplify and improve the classification of the classified civil service."

Opinion.

The Charter, Article XIII, dealing with "Civil Service" Section Two, provides:

"The (Civil Service) Commissioners shall classify all the places of employment in or under the offices and departments of the City and County mentioned in Section 11 of this Article, with reference to the examinations hereinafter provided for. The places so classified by the Commissioners shall constitute the classified civil service of the City and County, and no appointment to any such place shall be made except according to the rules hereinafter mentioned."

Section 4.

"All applicants for places in the Civil Service shall be subject to examination, which shall be public, competitive and free. Such examinations shall be practical in their character, and shall relate to those matters only which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed."

* * *

Section 6.

"Notice of time, place and general scope of every examination shall be given by the Commissioners by publication for two weeks preceding such examination in the official newspaper, and such notice shall also be posted by the Commissioners in a conspicuous place in their office for two weeks before such examination."

And Section 7 requires your Commission to make up eligible lists from these examinations for each of such classes so determined upon by your Commission.

I assume that the Civil Service Commission has, in the classification of the Civil Service in this City and County,

followed the above requirements of the Charter, and in the notices of examination for the different classes have indicated the general scope of the examination, and that these examinations have been given to "test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed." That is, that each class so determined upon has been a distinct class as contemplated by the requirements of the above charter section; and if this has been done none of these classes can be consolidated, as contemplated in your communication.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

What Permits May be Legally Granted by the Mayor.

January 24th, 1912.

Sir: I am in receipt of your request under date of January 15th, as follows:

"There are many persons applying to the office of the Mayor, asking for permits of various kinds, especially permits for automobile stands. There have been several cases in which permits have been sought by vendors. The Mayor directs me to request you to get him an opinion as to the legality of issuing permits of this kind. There is on file in this office an opinion from your office, dated March 28th, 1910. This is an opinion relating especially to the subject of permits to fruit dealers or other vendors who maintain wagons in streets, etc. Has there been any change in the law since that opinion was rendered?

Any information that you can give the Mayor on the general subject of permits of various kinds, will be of great value to this office."

Order No. 1611, approved December 23rd, 1880, "regulating the use of vehicles on the public streets, and boats in the waters of the bay", provides as follows:

"Section 1. Any person who shall violate any of the provisions of this order shall be deemed guilty of misdemeanor and punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both.

Section 2. Every vehicle, except railroad cars, buggies and rockaways, which shall be used in this City and County for the conveyance of persons by land from place to place for hire, shall be deemed a hackney carriage within the meaning of this Order; provided, that rockaways having seating capacity of more than four persons shall not be excepted."

Section 4 of this Ordinance, as amended by Ordinance No. 1696, approved October 23rd, 1911, provides as follows:

"Bill No. 1900. Ordinance No. 1696. (New Series) Amending Section No. 4 of Order No. 1611, entitled "Regulating the use of vehicles upon the public streets and boats in the waters of the bay.

Be it ordained by the people of the City and County of San Francisco as follows:

Section 1. Section four of Order No. 1611, the title of which is recited in the title of this Ordinance, is hereby amended to read as follows:

Section 4. It shall be unlawful for any person having the charge or control of any hackney carriage to suffer or permit, and for any person, firm, association or corporation to cause or aid and abet any person having the charge or control of any such hackney carriage to stand, while waiting for employment on any street, square or other public place, not designated as a hack stand without first obtaining the written permission of the Mayor, and the written consent of the tenant or occupant of the ground floor or that portion of the ground floor of the building for such purpose, and also of the owner of such property, and such permit shall

under no circumstances be transferred by the grantee thereof; provided, that the Mayor shall not grant permits to allow more than four hackney carriages to stand, while waiting for employment in any one block; and further provided, that the Mayor shall have the power to revoke any such permit without notice.

The following places shall be known and designated as hack stands:

First: Around Portsmouth and Washington Squares, United States Postoffice and United States Mint, and other public squares or ground as may be designated by the Mayor from time to time, but not in front of the gates thereof during the time such gates are open, nor on the street crosswalks, nor in double lines; provided, that no hackney carriage shall stand in front of any public square within ten feet of any street crossing.

Second: At the ferries

Third: Steamboat landings; and

Fourth: Railway depots.

Fifth: All the above hack stands, except where permits are necessary and those under paragraph 6, shall be open to all hacks, the first occupant holding the place until he vacates it, and the next in line succeeding.

Sixth: Managers of each hotel may designate a passenger coach with the name of the hotel conspicuously placed thereon, and of capacity for six passengers inside, to stand at all times in front of such hotel, and also designate carriages, not more than two of which at any time, may stand in front of the main entrance of such hotel.

Section 2. All Ordinances and parts of Ordinances in conflict with this Ordinance are hereby repealed.

I also call your attention to Ordinance No. 812, approved June 11, 1903, "prohibiting the discharge of cannon, fire arms and fireworks" as follows:

"Section 1. It shall be unlawful for any person to discharge or cause to be discharged any cannon, without special

permission in writing from the Mayor, which shall designate the time and place of the firing and the number of discharges which are authorized. A copy of the permit shall be filed by the person obtaining the same in the office of the Chief of Police at least two (2) hours before the time of such firing, and the person or persons engaged in the discharge of any cannon shall, on demand by any citizen or peace officer, exhibit the permit by which such firing is authorized.

Section 2. No person or persons, firm, company, corporation or association shall fire or discharge any firearms or fireworks of any kind or description within the limits of the City and County of San Francisco.

Provided, however, that public displays of fireworks may be given with the joint written consent of the Fire Marshal and the Chief of Police.

Section 3. Any person who shall violate any of the provisions of this Ordinance shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed five hundred (500) dollars, or by imprisonment in the County Jail for not more than six (6) months, or by both such fine and imprisonment.

Section 4. This Ordinance shall take effect and be in force immediately."

And also Ordinance No. 527 (New Series), approved August 6th, 1908, "regulating in certain cases and prohibiting in certain other cases the lighting of bonfires."

"Section 1. It shall be unlawful for any person to kindle or light or cause to be kindled or lighted any bonfire on any public highway, street, alley or place paved with bituminous rock, asphalt or basalt blocks, and it shall be unlawful to kindle or light a bonfire on any other character of public highway, street, alley or place, unless a written permit has been obtained from the Mayor to do so.

Section 2. It shall be unlawful for any person to kindle or light or cause to be kindled or lighted any bonfire on any vacant lot or other premises within the limits of the City and

County of San Francisco unless the owner or lessee of said vacant lot or premises has first obtained from the Mayor a written permit so to do.

Section 3. Any person who shall violate any of the provisions of this Ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$500 or by imprisonment in the County Jail for not more than six months, or by both such fine and imprisonment.

Section 4. Ordinance No. 1024, approved October 27th, 1903, and all provisions of any Ordinance in conflict with the provisions of this Ordinance are hereby repealed.

Section 5. This Ordinance shall take effect and be in force immediately.

Referring to my opinion of March 28th, 1910, relating especially to the subject of permits to fruit dealers and other vendors who maintain wagons in the streets, etc., I find no change in the law since that opinion was rendered.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

Board of Fire Commissioners Must be Authorized by Ordinance to Make Appointments Otherwise than From Members.—Charter Provisions Concerning Fire Department Control over State Law.

January 25th, 1912.

Gentlemen: I have your request of January 19th containing the following resolution:

“RESOLVED, That the City Attorney be requested to inform this Board whether it has the power to make appointments of office employees, such as stenographers, etc., for the transaction of the administrative branch of the department otherwise than from the members of the fire depart-

ment: Also whether the Board of Fire Commissioners does not possess this power without first securing the action of the Mayor, under Section 35 of Article 16 of the Charter.

In connection with the inquiry we take the liberty of directing the attention of the City Attorney to the fact that under Article 9, Chapter 1, Section 5, the Board has the power to "prescribe the number and duties of * * * the employees of the department" as distinguished from those of its officers and members, and under Section 8, same article, the Commissioners shall "see that the officers, members and employes of the department faithfully discharge their duties" etc. Attention is also called to the provisions of the same article and chapter, particularly that portion of amended Section 6, which provides that the age limit therein prescribed shall not apply to Clerks in the office of the Commission, and also to advise whether Section 5, Chapter 1, Article 9, continues in existence, in so far as the same does not conflict with the provisions of the Charter, the law governing the Fire Commission holding office at the time the Charter went into effect, and particularly if the provisions in said previous laws are vested in the present Commissioners."

Opinion.

The Charter authorizes your Board to prescribe the number and duties of the employees of the Department and to see that the officers, members and employees of the Department shall faithfully discharge their duties, but the Charter does not authorize you to create additional places of employment in the Department to those mentioned in the Charter, nor does it authorize you to fix the salary or compensation of any employees.

Such being the case, in order that your Board may make appointments of office employees otherwise than from the members of the Department, it is necessary that you be authorized so to do by the Board of Supervisors acting in accordance with the provisions of Section 35 of Article XVI of the Charter.

This matter was fully discussed by me in an opinion rendered at the request of the Police Commissioners on December 19th, 1909, and found at page 465 of the opinions of the City Attorney, 1908-9, to which you are respectfully referred.

As to the second query contained in the final clause of your communication, you are advised that the provisions of the Charter relating to the conduct and government of the Fire Department are exclusive and control over any State law covering the same subject and that when the Charter went into effect the Fire Commission became subject to the provisions of the Charter irrespective of the provisions of the State statutes on the same subject.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

An Attempted Reinstatement of a Member of Your Department Having Been Held Invalid, Leave of Absence Would Be Valueless.

January 25th, 1912.

Gentlemen: I have your request for an opinion under date of January 13th, wherein you ask to be advised as to the jurisdiction of your Board to grant leave of absence to Paul Pyritz, a former member of the Fire Department.

The facts as stated in your request are that on December 9th, 1908, Pyritz was appointed a member of the Department. On November 4th, 1909, he resigned from the Department and on March 31st, 1910, an attempt was made to reinstate him to his former position in the Department.

On September 14th, 1911, at the request of the Grand Jury, I advised that the attempted reinstatement of Pyritz was invalid for the reason that his resignation had been voluntarily made. Such being the case he is no longer a

member of the Department and any leave of absence which you might give to him at this time would be of no value.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

The Head of the Department of Electricity is the Joint Commission Composed of Boards of Police and Fire Commissioners. The Chief is an Appointee of the Commission.

January 25th, 1912.

Gentlemen: I have your request of January 17th which reads as follows:

“Section 3, Chapter 9, Article 9, of the Charter, reads: ‘The Joint Commission may appoint such assistants and other employees as may be necessary to maintain and extend the Department of Electricity at all times. All appointments shall be made subject to Article 13 hereof.’ Will you kindly advise me whether the appointing power is vested in the Joint Commission or whether, per section 9 of Article 13, in the head of the Department, its chief.

“In order to act in a matter now pending, I would greatly appreciate your opinion at the earliest possible moment.”

Section 3 of Chapter IX of Article IX of the Charter provides the method of appointment of assistants and other employees of the Department of Electricity. This power is conferred upon the joint commission. The Chief is an appointee of this Commission and is at all times subject to the jurisdiction of the Commission. The head of the Department, as contemplated by Section 9 of Article XIII of the Charter, is a joint commission and not the Chief of the Department.

Respectfully,

PERCY V. LONG,
City Attorney.

Department of Electricity.

**Recordation of Marriage License in a Different County
From That in which Marriage Ceremony is Performed
—Recorder's Duties Ministerial—Upon Payment of
Proper Fees by Proper Party the License Should Be
Recorded.**

January 25th, 1912.

Dear Sir: I am in receipt of your communication of the 19th inst., as follows:

“A certain Justice of the Peace in San Mateo County performed a marriage ceremony, in that county, using a marriage license issued in San Francisco. The marriage license was returned to this department, and, since the data did not disclose that the ceremony was performed in another county, was received by me.

This license has not yet been copied into the record books, nor has it been indexed. Will you please let me know if I should return the certificate to the officiating Justice of the Peace, or whether having once received it, I must copy the same?”

Opinion.

The duty of the Recorder, in respect to the recordation of marriage licenses and certificates, is set forth in Section 4137 of the Political Code of this State, which makes it mandatory upon him, when any instrument, etc., authorized by law to be recorded, is deposited in the Recorder's office for record, to record the same without delay, etc.

Marriage licenses and certificates are authorized by Section 74 of the Civil Code to be recorded, and the fee for recording the same, as provided for by Section 4300-c of the Political Code, is one dollar, to be paid to the Recorder by the County Clerk issuing the license.

The duties imposed by the law upon Recorders are purely ministerial and not in any respect judicial.

The Recorder is not vested with power or authority to determine the legality of matters arising in any transaction leading up to and antecedent to the recordation of any document.

Measured by that standard, it is plainly apparent that no discretion is vested in the Recorder as to whether or not he shall record any instrument or document presented to him for recordation, accompanied by the proper and lawful fee for the same, or, as in this case, some provision being made by the law for the payment of the said fee by the County Clerk issuing the license.

The license having been issued by the County Clerk of this City and County, your fee for recording the license and certificate is provided for, and therefore no question arises as to that.

It is true that Section 69 of the Civil Code provides that all persons about to be joined in marriage must first obtain a license from the County Clerk of the county in which the marriage is to be performed, and it may be conceded that Section 74 of the same Code contemplates that the person solemnizing the marriage shall file the originals of the license and certificate with the Recorder of the county in which the ceremony is performed. All that being true, it is no concern of any Recorder in any of the counties of the State that some one else fails to perform his duty in the premises.

It is unnecessary for the purpose of this opinion for me to decide the matter of the legality of recording a marriage license or certificate in the Recorder's office in a county other than that in which the marriage ceremony is performed. That is a question to be determined and regulated by the persons upon whom the legal obligation is cast by statute.

I advise you that it is your duty, under the law, to record the papers mentioned in your communication.

Respectfully,

PERCY V. LONG,
City Attorney.

The Recorder.

**Ordinances 808 and 821 (New Series) Held to Be Valid.
Ordinances 1638 and 1639 (New Series) Deemed In-
valid in Part.**

January 26th, 1912.

Gentlemen: I have your request of January 24, which reads as follows:

"We would respectfully request your opinion as to whether the following Ordinances of the Board of Supervisors, relating to the Tax Collector's office, are valid:

"Ordinance 808 (New Series);

"Ordinance 821 (New Series);

"Ordinance 1638 (New Series);

"Ordinance 1639 (New Series).

"We send you hereto attached copies of said Ordinances."

As to Ordinances No. 808 and 821, they appear upon the face to be valid Ordinances and to have been passed in all respects in accordance with the requirements of the Charter. As to Ordinances No. 1638 and 1639 they are both invalid in part, to-wit:

The portion of Section 1 of each of said Ordinances providing that the compensation allowed to the extra employees shall be paid out of the money set aside for Tax Collector's extra clerks is contrary to the provisions of Section 1, Chapter V, Article IV of the Charter. This section authorizes the Tax Collector to appoint extra clerks "who shall be paid at the rate of not more than one hundred dollars a month during the time of their employment, but the total amount of payment for such extra clerks shall not exceed thirty-six thousand dollars a year."

In view of the limitations contained in this Section it is not proper to authorize the payment of salaries out of this fund allowed for extra clerks under the Charter where such salaries exceed the sum of One Hundred Dollars per month for any one person.

This defect in the Ordinance however does not invalidate it in all respects as it is not necessary for the Supervisors to set aside any definite fund for the payment of salaries for officers or employees authorized under the provisions of Section 35, Article XVI of the Charter as was determined by the Appellate Court in *Harrison vs. Horton*, 5 Cal. App. p. 415. This provision of the Ordinance is mere surplusage and may be disregarded. The salaries having been fixed by Ordinance they must be paid out of the General Fund and not out of the allowance for extra clerks.

As to Ordinance No. 1638 however there is another objection which would seem to invalidate the entire Ordinance. Section 2 of this Ordinance provides that the appointment to the position of expert accountant shall be made subject to the provisions of Article XIII of the Charter and shall be from the certified list of Deputy Tax Collectors. The terms of this section are conflicting, if the appointment is to be made subject to the provisions of Article XIII it cannot be made from the list of certified acting Deputy Tax Collectors and if it is to be made from the certified list of acting Deputy Tax Collectors it cannot be made subject to the provisions of Article XIII of the Charter.

Section 35 of Article XVI of the Charter requires that when any new position is created under the terms of that Section the appointment must be made subject to the provisions of Article XIII of the Charter where the Department authorized to make the appointment has been placed under the Civil Service provisions of the Charter. Where, therefore, a person has been certified to a particular position he loses his position on the certified list and is not subject to future certification unless the position which he has filled has been abolished or the force reduced. The standing of any person on the certified list cannot entitle him to certification to another position, so that in this case the position of expert accountant may be filled by the appointment of a Civil Service eligible to that position and such person must be secured by an examination held for that purpose. Until

such examination is held temporary appointment may be made in accordance with Section 10, Article XIII of the Charter and neither the Supervisors nor the Civil Service Commissioners have any control over the personnel of such appointments nor can they dictate to the appointing power who shall be appointed to such temporary positions.

Whether or not a condition of this kind in this Ordinance does invalidate the entire Ordinance so that the appointment made thereafter is illegal I am not prepared to decide. In the action entitled Williams vs. Boyle now pending before Judge Seawell of our Superior Court it was held, on demurrer, that a similar Ordinance was invalid and that that part of the Ordinance limiting the appointment to particular persons could not be segregated from the rest so as to leave the rest of the Ordinance valid. Though I have contended to the contrary in the action before Judge Seawell I am not prepared to say that this ruling is not correct. Until this case is finally determined therefore and a final ruling had upon this phase of the question involved I am of the opinion that the ruling of Judge Seawell should be followed as to Ordinances containing similar conditions. It is an objection which can be easily overcome by amendment and while the question is thus in doubt it would be better to avoid litigation by suggesting a change of this Ordinance to meet the ruling above referred to.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

Province of Department of Electricity—Must See That Construction Work is Carried On and Done in Accordance with Existing Ordinances.

January 26th, 1912.

Sir: I am in receipt of your communication of January 23, 1912, which reads as follows:

"I have been furnished by a representative of the Pacific Gas and Electric Company with copies of Resolutions 9032 and 9084, New Series, Board of Supervisors, in which that company is authorized to install arc lamps at certain specific street corners in various parts of the City. The company also submitted copy of Resolution 15608, second series, Board of Public Works, passed January 22, 1912, granting permission to the Pacific Gas and Electric Company to erect, approximately, 100 poles to carry primary, secondary and arc wires for City lighting at specified locations.

The company mentioned has also filed in this office approximately 50 applications for approval of specifications of aerial construction to be supported on the poles authorized to be set under the above referred to Board of Works Resolution, for the purpose of conducting on *primary, secondary* and arc wires.

I would draw your attention to the Works Board Resolution, providing for Primary, Secondary and arc wires "for city lighting". Most of the arc lamps in this city for street lighting require only arc wires, which are operated under high-voltage. The Resolution permits the erection of poles to carry Primary and Secondary wires also, which are used to deliver current into buildings.

I would respectfully request that you advise me as to whether under existing conditions this office should issue approvals for the proposed aerial construction described."

The province of the Department of Electricity in the premises extends only to requiring that the construction work carried on under the permits issued by the Board of Public Works is done in accordance with the Ordinances of the City

and County of San Francisco relating to the manner in which electrical construction must be done. The Department of Electricity is not concerned with the right of a company to install wires. That right is to be determined by other departments of the city government. Of course, where a permit is required before electrical work may be installed the Department should see that the company has received the necessary permit before the work is allowed to proceed. When the permit, however, has been obtained from the proper department, the jurisdiction of the Department of Electricity, as above stated, extends only to requiring the company to do the work in the manner required by the Ordinances of the City.

Respectfully,

PERCY V. LONG,
City Attorney.

Chief, Department of Electricity.

**Chief of Fire Department May Assign Members to Any
Duties Which the Efficiency of the Department Demands.**

January 30th, 1912.

Gentlemen: I have your communication of January 24th, which reads as follows:

“When the present Charter went into effect, Mr. Thomas Buckley was employed in the Corporation Yard of the Fire Department in the capacity of harnessmaker and was also a member of a relief engine company.

Without the certification of this Commission, the Fire Commission appointed said Buckley on July 13, 1911, as a hose-man in the Fire Department, and assigned him to duty in the Corporation Yard in the capacity of harnessmaker. We would respectfully request you to advise us as to whether said Buckley can, at the same time, hold title to both the said classes, and, if not, to which of said positions is he entitled.

We would also respectfully request that you advise us as to whether or not a hoseman of the Fire Department can be assigned, except in cases of emergency, to perform the work of a hostler while there are Civil Service eligible hostlers available for appointment."

First: I do not assume that any claim is made by Buckley to hold title to the two positions—that of hoseman and that of harnessmaker. From the action which was taken on July 13, 1911, it seems to have been his desire to gain the rank of hoseman and in this manner become a permanent member of the fire fighting force of the Department and eligible in that way to promotion to the next higher rank. Section 1, Chapter II, Article IX of the Charter provides that members of the Department, at the time that the Charter went into effect, should be appointed without the necessity of Civil Service examination. It is taken for granted that the purpose of this section was to continue members of the Fire Department in the force in the same rank which they held at the time the Charter went into effect. Such being the case, Buckley, holding the position of harnessmaker in the Corporation Yard at the time the Charter went into effect, continues as an employee of the yard and not as a member of the fire fighting force of the Department, though subject at all times to the orders of the Chief of the Department for any duty which the Chief may see fit to assign to him. To obtain the rank of hoseman now and thus become eligible to participate in examinations for promotion, it would be necessary for Buckley to first take examination for the position of hoseman. By your rules the examination for firemen (including hosemen) is open to all and the positions of the employees of the Corporation Yard are not ranked for promotional examination. They are in a class by themselves and those holding such positions are entitled to participate in the examinations for firemen on the same basis as those who are not connected with the Department.

Second: The Charter designates the Chief of the Department as its executive head and gives him full control over the

subordinate officers, members and employees of the Department. For this purpose the Chief may assign members of the Department to any duty which the efficiency of the Department may demand. For any abuse of discretion or violation of the Charter in this respect the Chief is responsible only to the Fire Commissioners. Your question, therefore, becomes academic as the qualification contained therein, "except in cases of emergency", leaves the determination of the duty of the Chief of the Department and the manner in which it is performed with the Fire Commissioners. The Fire Commission must determine the existence of the emergency or the necessity for any unusual assignment and for any violation of the Charter in this respect the Fire Commissioners are responsible to the Mayor.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Ordinances 777 and 761. Kinetoscopic Exhibitions Require Permit from Police Commissioners and are Prohibited Within 200 Feet of a Church or School.

January 31st, 1912.

Gentlemen: I am in receipt of your communication of January 26, 1912, as follows:

"We respectfully request an opinion from you as to whether or not the provisions of Section 4a of Ordinance No. 777 of this City and County, which prohibits the granting of a permit to conduct a Kinetoscope Parlor within a distance of two hundred feet from the front line of any church or school, or within one hundred feet of the property line on the sides or rear of any church or school, applies to an application made under the provisions of Ordinance 761, to give moving picture

exhibitions where the applicant intends to exhibit the said pictures in connection with a vaudeville performance?

The above question arises out of an application made to give moving pictures in the premises No. 1715 Polk Street, the rear wall of which is located 32 feet from the side wall of the First Presbyterian Church on Washington Street, near Polk Street. The application has been continued to February 1, 1912, at which time we would be pleased to have your opinion."

Opinion.

Ordinance No. 777, entitled "Imposing a license on public roller skating rinks, revolving wheels, chutes, toboggan slides, museums, kinetoscope and phonograph parlors, panorama and cyclorama", and Section 4a thereof provides as follows:

" * * * * The Board of Police Commissioners shall not issue any permit and the Tax Collector shall not issue any license to any person, firm or corporation to conduct a public roller skating rink, revolving wheel, chutes, toboggan slide, kinetoscope and phonograph parlor, panorama or cyclorama, within a distance of two hundred feet from the front line of any church or school, or within one hundred (100) feet of the property line on the sides or rear of any church or school."

You ask whether this restriction as to the distance from a church or school "applies to an application made under the provisions of Ordinance No. 761 to give moving picture exhibitions where the applicant intends to exhibit the said pictures in connection with a vaudeville performance."

Ordinance No. 761 (New Series) is an Ordinance "regulating moving picture exhibitions and entertainments at which moving pictures are exhibited", and it requires a permit from the Police Commissioners before any person may "conduct or carry on, or cause or permit to be held, conducted or carried on, any moving picture exhibition or any entertainment at which moving pictures are exhibited."

It appears from a reading of the above two ordinances, that Ordinance 777 is restricted more particularly to "kinetoscope

parlors"; that is, moving picture exhibitions, while Ordinance No. 761 (New Series), in more general terms, applies to any moving picture exhibition "or any entertainment at which moving pictures are exhibited". The restriction as to distance from a church or school is contained in Ordinance No. 777, and not in Ordinance No. 761 (New Series).

It is, therefore, my opinion, that if any business is, in fact, a vaudeville performance, any exhibition of moving pictures therein being only incidental to this vaudeville performance, that the distance restriction contained in Ordinance No. 777 does not apply.

I do not believe, however, that the mere including of some vaudeville features in connection with this business, if it be, in fact, a moving picture or kinetoscope business, would relieve such a place of this restriction contained in Ordinance No. 777.

This is, of course, a question of fact for your Board to determine in the case of each applicant for a permit.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Franchises Must Now Be Obtained by Public Service Corporations for the Use of the Streets for Any Purpose Including the Laying of Steam Pipes.

January 31st, 1912.

Gentlemen: I am in receipt of your letter of January 26th reading as follows:

"This Board is in receipt of notifications from the Pacific Gas & Electric Company, the City Electric Company and the Equitable Light & Power Company, that they contemplate opening certain streets for the purpose of laying pipes therein

to be utilized for conducting steam. These pipes are both mains and service pipes. In view of the recent opinion of yourself relating to the powers of lighting corporations to use the streets, this Board requests that it be advised as to what action it should take in this matter."

On October 28, 1910, I advised the Board of Supervisors that Section 19 of Article XI of the State Constitution, as it then existed, did not confer upon public service corporations the right to the use of the streets of the City for the purpose of furnishing steam for heating purposes without a franchise or permit from the Board of Supervisors.

The amendment of October 10, 1911, to the section of the Constitution above referred to has removed the privilege of using the streets formerly conferred by that section for the purpose of furnishing water and light. The Constitution does not at present confer any rights for the use of the streets for any purpose without the permission of the Board of Supervisors.

You are therefore advised that the opinion of October 28, 1910, above referred to, is still the law, and that the position there taken is strengthened by the recent constitutional amendment. It is, therefore, your duty to prevent the opening of streets for the purpose of laying pipes for the conduct of steam, except upon a permit or franchise theretofore obtained for that purpose.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Improvement of Lyon Street—Board of Works Should Disregard Remonstrances as to Assessments for Street Work which are Premature.

February 1st, 1912.

Gentlemen: I am in receipt of your communication of the 23rd inst., relative to the proposed improvement of Lyon Street, between Union and Filbert Streets, by the construction thereon of granite curbs and bituminous rock pavement with a fourteen foot central strip of basalt rock and by grading the said street to the official line and grade.

It appears from your communication that one Nancy B. Turner is represented on the assessment book of the City and County of San Francisco for the "next preceding fiscal year" as the owner of land liable to be assessed for said improvement, and that your Honorable Board caused copies of its resolution of intention to recommend said work to be mailed to all of the owners liable to be assessed therefor, including said Nancy B. Turner, as appeared from the assessment book of the City and County for the "next preceding fiscal year". That on January 8, 1912, there was placed on record in the Recorder's office a deed bearing date October 28, 1911, from said Nancy B. Turner and one Joseph J. Webb, conveying a portion of the Turner lot as represented on the assessment rolls for the "next preceding year". In said deed there was conveyed to said Webb 90 feet of the former frontage of the Turner lot on Lyon Street in front of which the said street work is proposed to be done, while only 25 feet represents the frontage on Filbert Street.

That the said deed was made after proceedings for the proposed work were under way, and that it was not recorded until after the expiration of the period of the publication of the said resolution of intention. The concluding paragraph of the communication in which you ask for my opinion is as follows:

"In view of the fact that the Turner lot will remain as represented as to description and assessed valuation on the

Assessment Book for the '*next preceding fiscal year*' (Section 3, Chapter II, Article VI, of the Charter), and '*upon the last preceding Assessment Book*' (Sub. 3, Section 8, Chapter II, Article VI, of the Charter), and no alteration or modification of the descriptive lines of such lot or its assessed valuation will be made until the Assessor prepares a new assessment book between the first Monday in March and the first Monday in July, 1912 (Section 3650 et seq., Political Code), and upon which new assessment book will for the first time be represented the lot described in the Webb deed, with the assessed *valuation* thereof, this Board requests your advice as to whether it may continue the proceedings provided in the Charter for the contemplated street improvements here in question, notwithstanding the Webb protest, as well as the one filed on behalf of Miss N. B. Turner, which is herewith also transmitted to you, the aggregate frontage represented by both objectors being much less than a majority of the frontage liable for the expense of the proposed work. Final action on the said resolution of intention was postponed until January 31, 1912, pending your advice in relation to the matter."

Opinion.

The petition filed by J. J. Webb is one authorized by the last paragraph of Section 4, Chapter II, Article VI, of the Charter. The sole ground thereof, is that the lot conveyed to him by said Nancy B. Turner will be assessed for the cost of the contemplated improvement in a sum greater than 50 per centum of the value at which the said property was assessed on the last preceding Assessment Book of the City and County. This is an evident misstatement of the fact. The lot now owned by him was a part of the whole piece assessed to Nancy B. Turner on the last preceding Assessment Book, and consequently the Assessor did not assess the same as a separate and distinct parcel, and it does not appear as part of the property assessed to Nancy B. Turner, against which stands an assessment of a lump sum for the entire piece.

The Board of Public Works, under the Charter, can only take into consideration the property as it now stands assessed on the last preceding Assessment Book. Whether or not the parcel now owned by Mr. Webb will appear on the Assessment Book as a separate piece carved out and standing apart from the remainder owned by Nancy B. Turner, at the time when it will be necessary for the Board of Public Works to issue an assessment to cover the cost of the improvement, is problematical, as is also the question of what the amount of the assessment will be. It might, despite the statement of said Webb, be high enough to permit of an assessment of not more than fifty per centum of the assessed value.

In other words, the petition seeks to raise an issue which the Board, at the present time, cannot consider. It is premature and only the happenings and transactions of the future, in relation to the proposed work, can demonstrate whether the fact now alleged in said petition, will be available as a ground for not permitting an assessment to be levied against the lot.

You are advised that the proceedings for the contemplated work may continue, notwithstanding the petitions filed, but before doing so, it will be necessary for your Honorable Board to pass upon them in accordance with the provisions of the last paragraph of Section 4, Chapter II, Article I, and as they do not present any legal grounds of protest or remonstrance, you have full power to disregard them.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Sufficiency of Bid for Automobile Truck for Fire Department—The Article Being Proprietary, Unnecessary to Advertise for Bids.

February 6th, 1912.

Gentlemen: I am in receipt of your request for an opinion on the following state of facts:

Your Board advertised as follows for bids on a motor driven delivery truck for the Fire Department:

“Proposals.

For furnishing Motor Driven Delivery Truck or Wagon for the San Francisco Fire Department.

Office of the Board of Fire Commissioners, San Francisco, December 1, 1911.

In accordance with a resolution of the Board of Fire Commissioners, duly passed November 27, 1911, sealed proposals will be received in open session of the Board on Thursday, December 14, 1911, from 2 to 3 o'clock p. m., for furnishing a motor driven truck or wagon for use in the San Francisco Fire Department, in strict accordance with the specifications and conditions contained in the proposal blanks prepared by the Board of Fire Commissioners, on file, and copies of which may be obtained at the office of said Board, 64 Eddy Street, San Francisco, Cal.

W. H. McDONNELL, Secretary.”

In response to this advertisement a bid was submitted to your Board by the White Company, made out upon the printed form furnished by your Board to prospective bidders. At the top of this form is printed the following:

“To the Honorable Board of Fire Commissioners, in and for the City and County of San Francisco:

Gentlemen: In compliance with the annexed advertisement (i. e., the above proposal) hereby promise and agree to execute the contract, and furnish any of the automobile delivery truck required as specified therein,

to the satisfaction of the Board of Fire Commissioners and the Chief Engineer of the Fire Department.”

Neither of the two blank spaces above indicated were filled in by the White Company. However, immediately following the above unsigned printed form and on the same page is another printed form, and filled in by the bidder’s inserting his name and the amount in which he is bound, as follows:

“Know All Men by These Presents: That I (The White Company) am held and firmly bound unto the City and County of San Francisco aforesaid, in the just and full sum of Three hundred and fifty dollars (\$350.00), being ten per cent of the amount of my bid, for the payment whereof I hereby bind myself, my heirs, executors and administrators, firmly by these presents.

Now, the condition of the foregoing obligation is such that, whereas, I, the above bounden (the White Company) *am about to hand in and submit to the Honorable Board of Fire Commissioners of the City and County of San Francisco, the following bid or proposal for the furnishing of the automobile delivery truck therein mentioned*, under an invitation of said Board of Fire Commissioners contained in the notice or advertisement *attached to this bid or proposal*. Now, *if my bid or proposal shall be accepted*, and the contract to furnish any one automobile delivery truck is awarded to me by the said Board of Fire Commissioners, and I shall fail or neglect to pay the printing charges *and execute the contract therefor*, within five days after the same may be awarded, and to execute an adequate bond within said time to the satisfaction of the Board of Fire Commissioners, with two good and sufficient sureties, conditioned for the faithful performance of such contract on my part, then and in that case, the above named obligator authorizes the Secretary of the Board of Fire Commissioners of said City and County to present the certified check or certificate of deposit deposited with him, and collect the sum named in said check or certificate of deposit, as liquidated damages for such failure or neglect.

.....(Sign here.)”

And this was signed "The White Co., G. S. Brackett, Asst. Mgr." I understand that the certified check referred to was properly furnished.

It will be noted that the above blank forms were evidently drawn for an individual bidder, and not for a company or corporation bidder, but the White Company is not responsible for the apparent misuse of certain language therein contained, as they used the blank furnished by the Commission. Then followed specifications for the truck, as prepared by your Board, at the end of which appears the following, in the printed blank so furnished by your Board:

"Bidders will estimate as follows:

One (1) two ton motor driven delivery truck	Dollars	Cents
(etc. etc.) <i>to the satisfaction of the Board</i>		
<i>of Fire Commissioners, Chief Engineer</i>		
<i>and Superintendent of Engines thereof."</i>		

In the blank space under "Dollars" the bidder wrote in "3500", and in the space under "Cents" "00".

Also the White Company submitted certain additional specifications, describing their truck in greater detail than do the general specifications prepared by your Board.

You ask whether the failure of "The White Co." to sign the printed statement at the head of the proposal invalidates the bid, and also whether there is any inconsistency between your specifications and those furnished by the company.

Opinion.

First: Art. IX, Chap. II, Sec. 4 of the Charter provides that "the provisions of Art. II, Chap. III, of this Charter in regard to the advertising for proposals, the affidavit and security accompanying the same, the presentation and opening of proposals, the awarding of contracts and the security for the performance thereof, shall, *so far as the same can be made applicable*, apply to all proposals and contracts made, awarded or entered into for furnishing supplies to the Fire Department. * * * * *

I find nothing in the provisions of Art. II, Chap. III of the Charter, so referred to, which requires a bidder to sign any such promise "to execute the contract, and furnish any automobile delivery truck as specified in the proposal, to the satisfaction of the Board of Fire Commissioners and the Chief Engineer", as is contained at the head of the printed form you furnished the bidders.

Second: Even if such a promise were required, we find it, in substance, contained in the printed form furnished by your Board at the end of your Board's specifications, where it is said:

"Bidders will estimate as follows:

One (1) two ton motor driven delivery truck, as per above specifications, delivered f. o. b. Corporation Yard of the Fire Department, San Francisco, California, *to the satisfaction of the Board of Fire Commissioners, Chief Engineer and Superintendent of Engines thereof*" (after which form the bidder filled in the figures "3500"), i. e., when we read along with this the undertaking signed by the White Company and attached to said specifications, wherein the White Company undertakes that if they "fail or neglect to * * * *execute the contract therefor* * * * and to execute an adequate bond * * * *conditioned for the faithful performance of such contract on their part*", then the certified check accompanying the bid was to be forfeited.

Third: In connection with "Second", above, it is to be noted that the above undertaking, which was properly signed "The White Co., G. S. Brackett, Asst. Mgr.", states that "whereas * * * the White Co. *am about to hand in and submit* * * * *the following bid or proposal* * * * under an invitation * * * contained in the notice or advertisement *attached to this bid or proposal*. Now, if *my bid or proposal shall be accepted*", etc., etc.

And then this document, properly signed, is attached to the specifications furnished by the Board, including the figures of \$3500 filled in by the bidder at the end of these specifica-

tions. I am of the opinion that this undertaking, properly signed, and the specifications, properly filled in, should be read together, and being so read the White Company specifically refer to their "following bid or proposal", and to "this bid or proposal", and, again, to "my bid or proposal". So reading the document as a whole it seems to be intended by the White Company as a bid or proposal, as required by the Charter provisions above referred to.

Fourth: I find nothing in the specifications submitted along with the bid by the White Company which is inconsistent with the specifications prepared by your Board and also included with their bid. Your Board's specifications end: "Bidders will estimate as follows: One (1) two ton motor driven delivery truck or wagon, *as per above specifications*", and it is opposite this language that the bidder filled in the figure "3500". As I understand the additional "specifications" furnished by the White Company, it is simply a more detailed description of the trucks than is given in your Board's general specifications. For instance, your specifications say "Figures to include one extra set of tires". Their additional specifications say "Tires: 36x4 inches, solid tires front and rear; dual in rear". They having attached your specifications to their bid, they become a part of the bid, and, the company undertakes, therefore, to furnish an extra set of tires.

Again, your specifications say:

"Vehicle shall be equipped with all necessary tools, the latest improved warning siren and wrenches, etc., for working parts and tires, etc., needed for and peculiar to vehicle furnished under these specifications, also side and tail lights fitted with Prest-o-Lite gas tank for supply same."

The Company's additional specifications say:

"Regular equipment:—Two oil side lamps and tail lamp, tire repair outfit, horn and bulb, tools including jack, seats, etc."

I take this to mean that that is the regular equipment of the White Truck, and, if there are any additional things required in the specifications prepared by your Board, the Company, by attaching your Board's specifications to their bid agrees to furnish the equipment thus called for. Further, the contract itself may include all these things.

Fifth: I respectfully call your Board's attention to my opinion given to your Board on January 10, 1912, in which I advised that in the case of proprietary or patented articles it would not be necessary for your Board to advertise for bids at all, provided that the facts came within the conditions indicated in that opinion.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

**City Not Liable for Paving Roadway on Easterly Side of
Steuart Street.**

February 6th, 1912.

Gentlemen: I am in receipt of your communication of the 23rd ult., as follows:

"I am directed by the Streets and Sewers Committee of the Board of Supervisors to request you to advise said Board as to whether or not the City and County of San Francisco is liable for the paving of roadway on the east side of Steuart street between Folsom and Harrison streets."

Opinion.

The question presented by your communication resembles, to a large extent, the question propounded in a communication from the Board of Public Works in relation to the jurisdiction of said Board to award a contract for street im-

provements on the easterly half of Illinois street between Eldorado and Eighteenth streets. In answer to said communication from the Board of Public Works I rendered an opinion on November 24, 1909, which opinion may be found in the published opinions of the City Attorney for the years 1908-9 at pages 454, et seq.

In that opinion I advised the Board that as the State Board of Harbor Commissioners had entire jurisdiction over the easterly half of said Illinois street, conferred upon said Board by Section 2554 of the Political Code, that it had no authority to order work under the assessment plan of the Charter to be done on the easterly half of said street.

Consequently, as the municipality has no power to order work done on the easterly half of Steuart street between Folsom and Harrison streets over which jurisdiction is given to the State Board of Harbor Commissioners by the same section of the Political Code, the question of payment for any repairs or improvements on said easterly half of said street can never arise between the State of California or the State Board of Harbor Commissioners and the municipal authorities of the City and County of San Francisco.

That portion of Steuart street, being under the jurisdiction of the State Board of Harbor Commissioners, all repairs and improvements thereon must be made by the State Board of Harbor Commissioners and not by the City and County of San Francisco.

You are therefore advised that the City and County of San Francisco is not liable for the paving of the roadway on the easterly side of Steuart street between Folsom and Harrison streets.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Employers Liability Law. City Has Not Elected to Become Subject to Provisions of this Act—City Not Liable for Injuries Sustained by T. O'Connor which were Accidental.

February 6th, 1912.

Gentlemen: I have your request to be advised whether the claim of T. O'Connor, an employee of the City on the Geary Street Municipal Railroad, for damages for injuries received in the course of his employment, comes within the purview of the recently enacted Employers' liability law and whether the City is liable for damages for injuries received by City employees under this law.

In the absence of any express statute to the contrary, the City would be liable for injuries of this kind only where it could be shown that the City was at fault. It is the general rule that where the City is engaged in strictly governmental functions it is not liable for the negligence or wrongful acts of its officers or agents which cause injury to another. This rule, however, does not apply where the City is engaged in a strictly proprietary capacity, such as the operation and maintenance of water works, gas or electric light plants and street railroads.

For the purpose of determining the question of liability for negligence of its officers and employees all these functions are held to be in the private and corporate capacity of the City rather than in its governmental capacity. (*Davoust v. Alameda*, 149 Cal. 69; *Roberts v. St. Mary's*, 78 Kans. 707).

In order to provide compensation to employees for injuries where negligence could not be proven, the Act of April 8, 1911, known as the Employers' Liability Act, was passed. Section 3 of this Act provides that "liability * * * shall, without regard to negligence, exist * * * against an employer for any personal injury accidentally sustained by his employees."

For the purpose of the Act an employer is defined in Section 4 to be "The State, and each county, city and county,

city, town, village and school districts, and all public corporations, every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, **at or prior to the time of the accident** to the employee, for which compensation under this Act may be claimed, shall, in the manner provided in the next section, **have elected to become subject to the provisions of this Act**, and who shall not, at the time of such accident, have withdrawn such election."

Section 5 of the Act then provides that such election on the part of the employer shall be made by filing with the Industrial Accident Board a written statement to the effect that he accepts the provisions of the Act.

The City has not elected to become subject to the provisions of the Act and is, therefore, not bound by its terms. Whether or not the provisions of the Act could constitutionally be applied to this City I need not decide at this time.

Inasmuch as the facts contained in the papers attached to your communication do not show any evidence of negligence on the part of the City or any of its officers resulting in the injury, but, on the contrary, show that the injury was caused by an accident merely, there is no liability on the City to pay the claim presented.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Assessor Should Remove Assessments on Certain Portions of
Corbett Ave. and Declare the Same a Public Street.**

February 7th, 1912.

Gentlemen: I am in receipt of yours of January 4th as follows:

"I am directed by Supervisor John I. Nolan, Chairman of the Committee on Streets, Sewers and Parks, to request you to advise the Board as to whether or not the Assessor should be directed to remove the assessment on the hereinafter described property, and declare that part of Corbett Avenue a public highway, to wit:

"Commencing at the westerly line of Ord Street, thence running Westerly 136 degrees by a uniform width of 50 feet, and known as Horner's Addition No. 124, now assessed in the name of B. Joost."

Opinion.

Behrend Joost, to whom the said property appears on the assessment roll to be assessed, commenced an action No. 45684 in the Superior Court, of this City and County at some time previous to June 9, 1894, against A. E. Bukman and the City and County to restrain them from opening Corbett Avenue, in Horner's Addition Block No. 124. The case was tried and on May 27, 1894, judgment was rendered in favor of defendants. No further proceedings were had or taken and said judgment became final and concluded said Behrend Joost from interfering with said defendants in the matter of opening said street, and the same constitutes a public street of this City and County.

In my opinion, the Board of Supervisors should direct the Assessor to remove the assessment on said property and declare that part of Corbett Avenue to be a public street.

Respectfully,

PERCY V. LONG,
City Attorney

Board of Supervisors.

**Master Plumber's License—Having Passed Examination
Under General Law He Is Entitled to Renewal of His
License.**

February 6th, 1912.

Gentlemen: I am in receipt of your communication of the 13th ult. as follows:

"Mr. Richard A. McLaughlin left at the office of the Board of Health on December 30th, 1911, an affidavit properly filled out, showing his name, place of business, nativity, etc., as required by Section 167 of Ordinance No. 615, and also a duly executed bond in the sum of \$500. He presented to the Health Officer a license issued to him on January 22nd, 1891, showing he had passed at that time a satisfactory examination before the Board of Health. There is, on the part of the Board, hesitancy to issue the license to him for the reason that it appears from Section 168 of the Plumbing Ordinance that no license shall be granted to a master plumber for more than one year and by the subsequent sections the license must be renewed every twelve months. Also, when he ceases to carry on the business of master plumber, ipso facto, he ceases to be a master plumber and his registration is cancelled.

The attorney for McLaughlin makes the claim that these sections of the ordinance are unconstitutional and are in violation of the vested rights of his client. He claims that having once obtained his master plumber's license, it should be good for all time whether he engages in the business of a plumber or not. I am inclined to doubt the position taken and believe it is within the police powers to regulate the conduct of this or any other business."

Opinion.

It appears that Ordinance No. 615, (New Series), was approved November 27, 1908, and that it expressly repealed Ordinance No. 1504, adopted May 29, 1905, entitled "Estab-

lishing Rules and Regulations for the Plumbing and Drainage of Buildings in the City and County of San Francisco.”

Ordinance No. 1504 is not available and therefore I am unacquainted with its provisions. The fact remains, however, there was no legislation on the subject of licensing master plumbers prior to the approval of said last mentioned Ordinance.

There was in existence a general law providing for the examination and licensing of master plumbers, approved March 3, 1885, (Stats. 1885, p. 12) as amended by the Act of March 9, 1887, (Stats. 1887, p. 58).

That Act in full, as amended, is as follows:

“Section 1. It shall not be lawful for any person to carry on business, or labor as a master or journeyman plumber in any incorporated city, or in any city and county, in this State, until he shall have obtained from the Board of Health of said city, or city and county, a license authorizing him to carry on business, or labor as such mechanic. A license so to do shall be issued only after a satisfactory examination by the Board of each applicant upon his qualifications to conduct such business, or to so labor. All applications for license, and all licenses issued, shall state the name in full, age, nativity, and place of residence of the applicant or person so licensed. It shall be the duty of the Secretary of each Board of Health to keep a record of all such licenses issued, together with an alphabetical index to the same.

“Sec. 2. A list of all licenses plumbers shall be published in the yearly report of the Health Officer of Board of Health.

“Sec. 3. The drainage and plumbing of all buildings, both public and private, hereafter erected in any city, or city and county, shall be executed in accordance with plans previously approved in writing by the Board of Health of said city, or city and county; and suitable drawings and descriptions of the said drainage and plumbing shall, in each case, be submitted to the Board of Health, and placed on file in the

Health Office. The said Board of Health is also authorized to receive and place on file drawings and descriptions of the drainage and plumbing of buildings erected prior to the passage of this Act.

"Sec. 4. The Board of Supervisors or other city, or city and county officials, whose duty it is to make appropriations and tax levies for general purposes of such city, or city and county, shall make the necessary appropriation and tax levies, and shall insert the same in the yearly tax levy, to provide for carrying out the provisions of this Act. Such appropriations and levy shall be made at the same time, and in the same manner, as appropriations and tax levies are made for other city, or city and county, purposes.

"Sec. 5. In any city, or city and county, where there is, under existing laws, a Health Officer, but no Board of Health, such Health Officer shall perform all the duties required by this Act of the Board of Health until a Board of Health shall be created, and in any city, or city and county, where there is no Health Officer, nor Board of Health, the Board of Supervisors, or City Council, or other municipal legislative Board or body, shall create a Board of Health, who shall perform all duties required by this Act of the Board of Health or Health Officer.

"Sec. 6. Any Superior Court or Judge thereof, shall have power to restrain by injunction the continuance of work to be done upon or about buildings or premises where the provisions of this Act have not been complied with, and no undertaking shall be required as a condition to the granting or issuing of such injunction, or by reason thereof.

"Sec. 7. Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished accordingly.

"Sec: 8. This Act shall take effect immediately."

It appears that said Richard A. McLaughlin possesses a license issued to him on January 22, 1891, showing that he had, at that time, passed a satisfactory examination before

the Board of Health. Unquestionably that license was issued to him under the provisions of the general law of 1885, as amended. Therefore, I should say that, when he has already passed a satisfactory examination showing that he possessed all the qualifications necessary to entitle him to a license, it would be unreasonable to subject him again to the same or a similar examination.

Section 168 of Ordinance No. 615 (New Series), does not, in any manner, require that a master plumber, having passed a satisfactory examination to subject himself to another examination at the expiration of the year for which his license is granted.

An Ordinance should never be so construed that the construction thereof would lead to an absurdity. Section 168 provides that no license shall be granted to a master plumber for more than one year or for the unexpired portion thereof. Section 169 provides that all licenses expire upon the first day of July of each year, unless sooner revoked.

It would not be seriously contended that a master plumber, after passing an examination, who had a license issued to him on June 1st, of, say, 1912, which according to the terms of Section 169, would expire July 1, 1912, would be compelled to take another examination to entitle him to a license to engage in business on the 2nd day of July, 1912. This is not the evident purpose of the Ordinance taken as a whole. In my opinion, it seeks merely to require the renewal of licenses every year, thus giving the Board of Health a check in the matter of licenses.

What has been said above in respect to Sections 168 and 169 applies with equal force to Section 177. Therein it is provided that when any registered master plumber ceases to carry on the business of master plumber, then ipso facto he ceases to be deemed a registered master plumber, and his registration therefore, is cancelled; and before he can resume business as a registered master plumber he must comply with all the requirements of the Ordinance, just as if he had never been registered. We must read that section in connec-

tion with Section 167, which contains all the requirements in relation to the registration of master plumbers and contains nothing which requires another examination in order to entitle him to a certificate. Mr. McLaughlin has filed with the Board of Health the affidavit required by Section 167 and also a duly executed bond in the sum of \$500 as required by Section 167.

It seems to me that he has complied with the Ordinance in every respect. He shows that he has passed the examination under the general law, and in my opinion there is no valid reason why he should not be granted a license by the Board of Health of this City and County, and you are advised accordingly.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Health.

General Law Provides for the Licensing and Examination of Journeyman Plumbers, and the Board of Health May Enforce Provisions Thereof.

February 6th, 1912.

Gentlemen: I am in receipt of your communication of the 20th ult., wherein you call my attention to the fact that Local Union No. 442, United Association of Plumbers, Gas Fitters, Steam Fitters, etc., requests the Board of Health to enforce the provisions of the Ordinance relating to the registration of plumbers and requesting me to give my opinion as to whether or not Section 175 of said Ordinance No. 615 (N. S.) adopted November 27, 1908, requires that the Board of Health submit to registration all journeymen plumbers operating in the City and County of San Francisco.

Opinion.

Section 175 of Ordinance No. 615 of the City and County of San Francisco, known as the "Plumbing Law" is as follows:

“On and after the passage of this Ordinance every plumber doing business in the City and County of San Francisco shall register his name and address at the office of the Board of Health of said City and County.”

As I interpret the above section, and having in mind the sections of said Ordinance preceding and following it, it relates solely to those plumbers who are “doing business” in the City and County and it does not apply to journeymen plumbers. There is a wide distinction between plumbers doing, or engaged in business and those who work at said trade as journeymen. The Supervisors doubtless had that distinction in view when the Ordinance was adopted and, therefore, in their judgment, they provided that the Ordinance should apply only to master plumbers or those doing business in this City and County.

“There is no room for the play of interpretation when the language of the statute leaves no doubt as to the meaning of those who used it.” *King v. Armstrong*, 9 Cal. App. 368.

The rules for construction of ordinances are the same as for statutes. (*Ex parte Yick Wo*, 68 Cal. 303).

There exists, however, a *general law of this State* which requires every master or journeyman plumber to obtain from the Board of Health a license authorizing him to carry on business or labor as such mechanic.

The Legislature passed an act entitled “An Act to grant to Boards of Health in cities, and cities and counties, and counties the power to regulate the plumbing and drainage of buildings,” approved March 15, 1883, (Statutes 1883, page 366).

Section 1 provides that every master or journeyman plumber carrying on his trade shall, under such rules as the Board of Health of such county, or city and county, shall prescribe, register his name and address at the Health Office of such city, or city and county, and after the said date it shall not be lawful for any person to carry on the trade of plumbing in any county, or city and county, unless his name and address be registered as above provided. Section 6

provides that any person violating any of the provisions of the Act should be deemed guilty of a misdemeanor.

The next legislature passed an act entitled "An Act to grant to Boards of Health or Health Officers in cities or cities and counties the power to regulate the plumbing and drainage of buildings and to provide for the registration of plumbers," approved March 3, 1885. (Stats. 1885, p. 12). This Act was evidently intended as a correction of the preceding Act and to take its place and operated as a virtual repeal of the former Act. Sections 1 and 2 of the Act of 1885 were amended by an Act approved March 9, 1887, (Stats. 1887, p. 587) so that we have in the Act of 1885, as amended by the Act of 1887, the following:

"Section 1. It shall not be lawful for any person to carry on business, or labor as a master or journeyman plumber in any incorporated city, or in any city and county, in this State, until he shall have obtained from the Board of Health of said city, or city and county, a license authorizing him to carry on business, or labor as such mechanic. A license so to do shall be issued only after a satisfactory examination by the Board of each applicant upon his qualifications to conduct such business, or to so labor. All applications for license, and all licenses issued, shall state the name in full, age, nativity, and place of residence of the applicant or person so licensed. It shall be the duty of the Secretary of each Board of Health to keep a record of all such licenses issued, together with an alphabetical index to the same.

Sec. 2. A list of all licensed plumbers shall be published in the yearly report of the Health Officer or Board of Health.

Sec. 3. The drainage and plumbing of all buildings, both public and private, hereafter erected in any city, or city and county, shall be executed in accordance with plans previously approved in writing by the Board of Health of said city, or city and county; and suitable drawings and description of the said drainage and plumbing shall, in each case, be submitted to the Board of Health, and placed on file in the Health Office.

The said Board of Health is also authorized to receive and place on file drawings and descriptions of the drainage and plumbing of buildings erected prior to the passage of this Act.

Sec. 4. The Board of Supervisors or other city, or city and county officials, whose duty it is to make appropriations and tax levies for general purposes of such city, or city and county, shall make the necessary appropriations and tax levies, and shall insert the same in the yearly tax levy, to provide for carrying out the provisions of this Act. Such appropriations and levy shall be made at the same time, and in the same manner, as appropriations and tax levies are made for other city, or city and county, purposes.

Sec. 5. In any city, or city and county, where there is, under existing laws, a Health Officer, but no Board of Health, such Health Officer shall perform all the duties required by this Act of the Board of Health until a Board of Health shall be created, and in any city, or city and county, where there is no Health Officer, nor Board of Health, the Board of Supervisors, or City Council, or other municipal legislative Board or body, shall create a Board of Health, who shall perform all the duties required by this Act of the Board of Health or Health Officer.

Sec. 6. Any Superior Court, or Judge thereof, shall have power to restrain by injunction the continuance of work to be done upon or about buildings or premises where the provisions of this Act have not been complied with, and no undertaking shall be required as a condition to the granting or issuing of such injunction, or by reason thereof.

Sec. 7. Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished accordingly.

Sec. 8. This Act shall take effect immediately.

The enactment of the ordinance in question is a valid exercise of the police power granted to this city and county by Section 11, Article XI of the Constitution. It is true that it legislates upon a subject matter already provided for by a

general law of the State, viz: the licensing of master plumbers after an examination as to their qualifications, but the Supreme Court held, in the case of *Ex Parte Hong Shen*, 98 Cal. p. 681, that a city ordinance is not inconsistent with the general law merely because it makes another and different regulation on the same subject when there is no direct conflict between its terms and the provisions of the State law.

The ordinance, however, does not embrace within its scope the registration, examination or licensing of journeymen plumbers. It is a familiar rule that when a municipality does not legislate upon a subject that any general law applicable thereto shall govern, as is true also of the converse of that proposition, that when there is no general law affecting any particular subject, the municipality may legislate with respect thereto.

It follows, from what has been said, that Ordinance No. 615 does not provide for the *registration of journeymen plumbers* and that the Board of Health, by reason thereof, has no power thereunder to require such registration; that the Act of March 3, 1885, as amended, does require the examination and *licensing of journeymen plumbers* and that the Board of Health of this City and County has power to enforce the provisions of said Act, as amended, and you are advised accordingly.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Violation of the Rules of the Fire Department is Cause for Dismissal of a Member.

February 8th, 1912.

Gentlemen: I have your communication of January 27th containing copy of charges filed against Hubert Jennings, a member of the Fire Department, and asking to be advised whether under such charges, your Board may dismiss him from the Department.

The complaint as filed specifies "insubordination in refusing to obey an order of his superior officers" as the charge which is to be answered, but the concluding clause of the complaint reads: "all of which is in violation of the rules and regulations of this Department and of Rule 16 and also of Rules 14 and 42 of the general rules in particular."

Upon the wording of the complaint the accused claims that he is subject to the penalties prescribed in Section 8 of Chapter III of Article IV only and that for a violation of the rules of the Department he is not liable to a dismissal from the Department. Section 7 of Chapter I of Article IX of the Charter provides:

"No officer, member or employee of the department * *
* shall be transferred or dismissed except for cause, nor until after a trial before the Commissioners."

Section 2 of Chapter II of the same Article provides for the manner of filing charges and the conduct of the trial.

Section 8 of Chapter I of the same Article authorizes the Commission to make "such rules and regulations as may be necessary to secure discipline and efficiency in the Department, and for any violation of such rules and regulations may impose reasonable fines upon the officers, members or employees of the Department, or may suspend any of them for such reasonable time as the Board may by rule prescribe."

In the absence of any statute limiting the power of removal, the general rule is that where the power of appointment is given in general terms the power of removal, in the discretion and at the will of the appointing power and without notice or a hearing, is implied and always exists, unless, of course, the appointment is made for a fixed term. Adopting this general rule it naturally follows that any limitation of the general power of removal must be strictly construed, and that no such limitation exists unless expressly declared.

Thus when the Charter, by Section 8 of Chapter I of Article IX, provides that the Commission may impose fines upon or suspend any officer, member, or employee of the Department

for violation of the rules and regulations it does not mean that such fines may be imposed or suspension had only after trial upon charges. By this Section the Commission may, without the filing of charges, and without trial, impose reasonable fines and suspend any member of the Department for violation of its rules. Such suspensions may be for such reasonable time as the Board may by rule prescribe.

By Section 7 of Chapter I and Section 2 of Chapter II, of Article IX, the power of the Commission to transfer or dismiss a member of the Department is limited to the extent that such transfer or dismissal can be made only for cause and only after a fair trial. The Charter does not define "cause" as used in these sections, but the general rule in such cases is that the cause must be some misconduct, neglect of duty, incapacity or unfitness for the position.

In Dillon on Municipal Corporations, Fifth Ed. Vol. 2, Sec. 477, it is said in this connection:

"When it is provided by Statute that an officer can only be removed for cause, without specifying the nature of the cause, it is necessarily implied that the cause shall be some dereliction, or general neglect of duty or incapacity to perform the duties of, or some delinquency affecting his general character and his fitness for, the office. The cause must be personal to the office, and implying an unfitness for the place. It means some substantial shortcoming which renders continuance in office or employment in some way detrimental to the discipline and efficiency of the service, and something which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place. * * * *Substantial breaches of the rules and regulations formulated by the city authorities or by the Civil Service Commission pursuant to statutory authority are sufficient cause for removal.*"

To the same effect are: *People v. Ham*, 59 N. Y. App. Div., 314; *Cleu v. Police Commission*, 3 Cal. App., 174; *State v. Hyman*, 22 Ohio Cir. Ct., 213.

Although rules have been formulated and causes of removal have been specified therein, these causes are not the exclusive

grounds for removal, and the officer or employee may be removed for other good cause. *Joyce v. Chicago*, 216 Ill., 466; *Kamman v. Chicago*, 222 Ill., 63.

Thus, where the rules of the Civil Service Commission provided that an employee absenting himself from duty without leave for ten days shall be considered as discharged, it was held, in the latter case, that the Commission could try and discharge an employee who had been absent only three days.

From the foregoing views, it follows that Section 8 of Chapter I of Article IX of the Charter provides a method for the punishment for violation of rules and regulations without trial, while Section 7 of the same Chapter and Article provides a method of transfer or dismissal upon trial for cause, and that a violation of the rules and regulations of the Department is "cause" within the meaning of this Section.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

**Power to Appoint Janitors for Public Buildings is Vested
Under the Charter in the Board of Public Works.**

February 9, 1912.

Gentlemen: I have your communication of February 8, 1912, which reads as follows:

"I am directed by the Committee on Public Buildings of the Board of Supervisors, to request an opinion from you as to whether or not the Board of Supervisors is vested with authority to appoint additional janitors in the Hall of Justice and Temporary City Hall buildings."

The Charter does not authorize the Board of Supervisors to appoint janitors for public buildings. Section 4 of Chapter I

of Article II of the Charter provides that the Board of Supervisors shall

“Appoint a clerk, sergeant-at-arms and, when authorized to do so by ordinance, such additional clerks and other assistants as may be deemed necessary.”

The clerks and assistants herein provided for are clerks and assistants of the Board of Supervisors to aid and assist the Board in its official duties. It is not intended to authorize the Board to make appointments in other departments or to perform duties not strictly in accordance with the duties of the Board.

Section 9 of Chapter I of Article VI of the Charter provides that:

“The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors. * * *

Sub. 4. Of the cleaning of all public buildings of the city and county and of the appointment of such janitors and employees as are needed for such purpose.”

This section of the Charter is clear and definitely determines the responsibility for the cleaning of the public buildings and the appointment of janitors for such purpose. For the purpose of determining the responsibility for its care the Temporary City Hall, being under lease for public purposes, must be deemed to be a public building.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Registration of City Bonds—Formalities Necessary Upon
Death of Holder.

February 9th, 1912.

Dear Sir: I am in receipt of your communication which reads as follows:

“Will you kindly advise this office what authority I will need to transfer registered Bonds standing in the name of ‘J. Hemsley Johnson Committee of Mary H. Sterrett.’ Since these Bonds were registered Mrs. Sterrett has died and J. Hemsley Johnson and Walter Hemsley have been appointed Executors under the will. The Executors desire to know what formalities, if any, we will require to make the transfer. The parties are all in Baltimore, Ind.”

I assume that at the time of the death of Mary H. Sterrett and at all times since that time the bonds have been and now are without the territorial limits of the State of California. In order for you to re-register the bonds in the name of the Executors, the Executors should furnish you with an authenticated copy of the probate of the will of Mary H. Sterrett, an authenticated copy of letters testamentary of the Executors, and a certificate by the Judge of the Court that the order admitting the will to probate has never been vacated, that the letters testamentary issued to the Executors have never been revoked and that no distribution of the bonds in the matter of the estate has ever been made. With this evidence before you you will be justified in re-registering the bonds in accordance with Section 10, Article XII of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

**An Authenticated Transcript of the Judgment Must be Filed
With the Auditor by the Judgment Creditor to Reach
Moneys Due the Debtor from the City.**

February 9th, 1912.

Sir: I am in receipt of your communication with reference to the demand of Grant Cordrey, Central Trust Company of California, and the Anglo-California Trust Company for the sum of \$1,500.00 being the amount retained by you upon the payment of the warrant issued in favor of the Condon-McGlynn Company and honored in part by you on the 27th day of April, 1911. It appears from the communications addressed to me that this money was retained by you by reason of the demand of a Mr. Sullivan upon the City and County Auditor for a sum approximating \$1,024.60, being the amount of the judgment in his favor against the Condon-McGlynn Company. The papers filed by Sullivan with the Auditor, upon which this money was withheld consisted of an *Abstract of a Judgment* rendered in favor of Sullivan against the Condon-McGlynn Company.

Opinion.

Prior to the passage of Section 710 of the Code of Civil Procedure it was not possible for a judgment creditor to execute upon money owing to a judgment creditor by a municipality. Section 710 of the Code of Civil Procedure reads as follows:

“The duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court of this State may be filed with the Controller of the State of California or the Auditor of any county, city and county, city, or other municipal or public corporation, from which money is owing to the judgment debtor in such action (and in case there be no Auditor then with the official whose duty corresponds to that of Auditor), whereupon it shall be the duty of any such official, or of such public officer with whom such transcript shall have been filed, to draw his warrant in favor of or to pay into the court from the docket of which the transcript has been taken, so much of the money, if sufficient there be, over

which such State of California, county, city and county, city, or other municipal or public corporation of which he is an official, or over which said public officer has control and custody and which belongs to or is owing to the judgment debtor in the cause designated in said transcript as will cancel said judgment; the money so paid into court shall be a discharge pro tanto of any amount so due or owing to such judgment debtor. For filing such a transcript any such official or public officer may charge a fee of fifty cents. Upon the receipt by any court of money under the provisions of this act so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor. Such transcript when so filed, shall be accompanied by an affidavit on behalf of the person in whose interest the same is filed stating the exact amount at the time due on such judgment, and that such person desires to avail himself of the provisions of this section."

Inasmuch as Section 710 provides the only mode of procedure for levying upon money owing to a judgment creditor by a municipality the provisions of that section must be closely followed. The Section requires that an "*authenticated transcript*" of the judgment be filed with the Auditor and, unless an authenticated transcript is filed, it follows that no relief can be had under Section 710 by a judgment creditor. This exact point was considered in the case of *Erkson vs. Parker*, 3 Cal. App. p. 98, and it was there held that the filing of the abstract of a judgment did not comply with the terms of the section. The term "authenticated transcript" means a certified copy of the judgment. Such a copy was not filed with the Auditor and, I therefore advise you that under the decision of *Erkson vs. Parker*, Sullivan did not comply with the provisions of Section 710, necessary to afford him the relief therein provided and that the demand of Sullivan should be disregarded in the payment of the amount due the Condon-McGlynn Company.

Respectfully,

PERCY V. LONG,
City Attorney.

The Treasurer.

City has Power to Engage Experts to Aid the City Authorities in the Acquisition of Public Utilities.—Such Experts Need Not be Residents.

February 10th, 1912.

Sir: I have your communication of even date, which reads as follows:

“Will you please advise me as to the power of the City to engage experts to aid the city authorities in the acquisition and construction of public utilities and to pay for the services thus rendered? Does Section 2 of Article XVI of the Charter apply to such persons?”

Power of the City to Engage Experts.

The authorities on the question of the power of a city or county to engage by contract the services of experts are confined almost entirely to the employment of additional counsel to advise the authorities on public matters or to prosecute or defend actions involving the rights of the city or county.

In *Smith v. Mayor*, 13 Cal. 531, the Supreme Court, in sustaining the power of the City of Sacramento to employ additional counsel said:

“When the charter of a city authorizes the city council to make by-laws and ordinances not repugnant to the constitution and laws of the United States, or of this State, to make appropriations for objects of city expenditure, to purchase, receive and hold, for the use of the city, real and personal estate; and to pass such other ordinances and by-laws for the regulation of said city as they may deem necessary; the authorities may employ attorneys to protect the interests of the city in litigation; and this is true, even if the charter provides for a city attorney to attend to the business of the city; other counsel may be employed when necessary.”

In the case of *Hornblower v. Duden*, 35 Cal. 664, the county of El Dorado was the owner of stock in a railroad company and the Board of Supervisors employed counsel other than the

district attorney to represent the county in litigation over this stock. The Supreme Court held that the county had power to do so.

In *Lassen County v. Shinn*, 88 Cal. 510, our Supreme Court held that the employment, by the Supervisors of a county of special counsel to collect money due the county from the State, appropriated by the State for the support of aged indigent persons, is within the discretion and judgment of the Supervisors. In this case the Court said further:

“It is settled law that where a county has legal business to be transacted, its board of supervisors may employ counsel, other than the district attorney, to transact the business, if in the judgment of the board the public interest will thereby be subserved. This is rested upon the ground that the district attorney may be incompetent, or sick, or absent from the county, or engaged in other business, so that he cannot attend to it, *or the business to be transacted may be outside the county.*”

So, in *Memphis v. Adams*, 9 Heisk (Tenn.) 518, the Supreme Court of Tennessee held that a city owning stock in a railroad company in another State may, by virtue of said ownership, employ counsel to attend to its interest in such State.

In employing counsel the Board's powers are plenary, unless limited by statute or charter, where the express power is conferred to perform a given act making such employment necessary. Thus, when the city and county is given express power to acquire public utilities and to issue municipal bonds, it has the implied power to do all such things as may be necessary or proper in order to carry out this express power.

In *Waterbury v. Laredo*, 68 Tex. 565, it was held that where the city was empowered to establish ferries it had the implied power to engage counsel to represent it in a matter involving their establishment.

As to the claims of Freeman and Hazen, for instance, two men who are experts in the matter of municipal water supply,

these men are engaged in the capacity of expert witnesses to testify in the proceedings pending before the Interior Department involving the rights of the city to the use of the Hetch Hetchy Reservoir. It is absolutely necessary to the success of the city's interests in this litigation that such experts shall be engaged, just as it frequently becomes necessary in litigation to engage experts in real estate, medicine, engineering and other branches of special knowledge. If the contention that the city is without power to engage such persons were to be sustained it is apparent that it would seriously handicap both the city attorney and the district attorney in the prosecution and defense of the litigation of the city and county. To carry the contention to its limit it would prohibit the district attorney from engaging expert witnesses in medicine, insanity, handwriting, etc., when such witnesses are necessary for the prosecution of his case. It is clear that the charter does not intend to impose such a handicap upon the city.

The same rule applicable to the employment of special counsel should apply to the employment of experts in engineering and other professions. The City has the power to engage such experts and to fix the compensation for the service rendered. When this is done the demands for such compensation are legal demands against the city.

Such Experts are Not Employees.

Section 2 of Article XVI of the charter provides:

"All deputies, clerks, assistants and other employees of the city and county must be citizens of the United States, and must, *during their respective terms of office or employment* actually reside in the city and county, and must have so resided for one year preceding their appointment."

Section 1 of Chapter IV of Article III of the Charter provides:

"The salaries and compensation of all officers, including policemen and employees of all classes * * * and others employed at fixed wages, shall be payable monthly."

Section 2 of Article XVI requires that deputies, clerks, assistants and employees *during their respective terms of office or employment* reside in the city and county.

These sections refer to the employee in the ordinary sense as distinguished from one who contracts to furnish certain data or perform service in a particular transaction, the "terms of employment" refer to the terms for which salaries or wages are paid, and cannot refer to one who contracts to procure a certain result where the nature of his services require that the greater part of his time be spent outside of the city.

"Within the ordinary acceptance of the word, one who is employed to render services in a particular transaction and of a particular nature, is not an employee. The term employee implies continuity of service, and excludes those employed for a special and single transaction. An attorney of an individual retained for a single suit is not his employee. It is true he is engaged to render services, but his services are rather that of a contractor than that of an employee."

Clark v. Remington, 42 Atl. 928 (Md.)

In Vane v. Neucombe, 138 U. S. 233; 33 L. Ed. 315, the United States Supreme Court distinguished an employee and a contractor as follows:

"We think the distinction pointed out by the Circuit Court is a sound one, namely, that to be an employee within the meaning of the statute, the plaintiff must have been a servant bound in some degree, at least, to the duties of a servant, and not a mere contractor, bound only to produce, or cause to be produced, a certain result—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

And in Frick Co. v. Norfolk & O. V. R. Co. 86 Fed. 725, 738, it is said:

"Within the ordinary acceptance of the term, one who is engaged to perform service in a particular transaction is not an employee."

“The terms ‘officers’ and ‘employees’ both alike refer to those in regular and continual service within the ordinary acceptance of the terms, and one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service and exclude those employed for a single transaction.”

Railroad Co. v. Wilson, 138 U. S. 501.

In *Linguist v. Hodges*, 248 Ill. 491, 94 M. E. 94, 98, the Court said:

“One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant.”

The foregoing decisions correctly state the rule and clearly distinguish between an employee as mentioned in the sections of the charter referred to and one who is engaged as an expert to produce a certain result.

It follows that the city has full power to engage the services of the experts mentioned without regard to Section 2 of Article XVI of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

**Manner of Appointment of Clerks and Assistants of the
Board of Supervisors Other than Those Authorized by
Charter.**

February 15th, 1912.

Gentlemen: I have your communication of February 14th relating to the manner of appointing clerks and assistants of

your board enclosing two different forms for a proposed Ordinance authorizing these appointments, you ask advice as to the necessity for such legislation and the legality of the Ordinances.

Section 4 of Chapter I of Article II of the Charter authorizes your Board to "appoint a clerk, sergeant-at-arms and, when authorized so to do by Ordinance, such additional clerks and other assistants as may be deemed necessary."

Under the provisions of this Section it is necessary for your Board, before any clerks or assistants, other than the one clerk and the sergeant-at-arms, can be appointed, to authorize by Ordinance the appointment of such clerks and assistants as are necessary. For this purpose the Ordinance should name the number of clerks or assistants deemed necessary with the official title of each. The authorization to make appointments and the fixing of the compensation is purely a legislative act but the appointment itself is not legislative but administrative; therefore the Ordinance should provide for the number, official designation and salary of each of the clerks and assistants deemed necessary to be appointed by the Board and the actual appointments should be made by Resolution. The Ordinance requires the approval of the Mayor while the Resolution being purely an administrative act of the Board itself does not require such approval.

As to your second inquiry it follows that neither of the two forms submitted is legal nor sufficient. The one, which is merely a blanket Ordinance, is insufficient because it circumvents the very purpose of the Charter. There can be no object in requiring the Board to act by Ordinance unless the Ordinance fixes the name and number of places with the salary attached to each. The other form is still more objectionable. It is superficially prepared. It does not create any positions or authorize the Board to do so by Resolution; the body of the Ordinance does not conform with the title; it attempts to repeal Resolutions by Ordinance: Section 1 attempts to appoint certain persons to positions "heretofore" created, yet

the Ordinance does not create any places or authorize any appointments.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

The James Lick Baths May be Taken Over by the City.

February 15th, 1912.

Gentlemen: I am in receipt of a copy of an offer made to the Board of Supervisors by the Trustees of the James Lick Bath Trust wherein the City and County of San Francisco is offered the property now managed by such Trustees, subject to the trust provision contained in the will of James Lick that the property known as the James Lick Baths shall be forever maintained as free baths for the public. I am also informed that your Committee desires to be advised as to the power of the City and County of San Francisco to assume the trust.

Opinion.

The powers of the City and County of San Francisco are as follows:

“The municipal corporation known as the City and County of San Francisco shall remain and continue a body politic and corporate in name and in fact, by the name of the City and County of San Francisco, and by that name shall have perpetual succession; may sue and defend in all courts and places and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy real and personal property; *receive bequests, gifts and donations of all kinds of property, in fee simple, or in trust for charitable and other purposes, and do all acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise*

dispose of the same in accordance with the terms of the gift, bequest or trust."

The Board of Supervisors is also empowered by Section 30 of Chapter II of Article II "to provide for the execution of all trusts confided to the City and County."

You are therefore advised that there is ample power in the city and county to assume the trust now carried on by the Board of Trustees of the James Lick Baths and that the Board of Supervisors has power to provide for the execution of such trust.

Respectfully,

PERCY V. LONG,
City Attorney.

Public Welfare Committee,
Board of Supervisors.

Temporary Deputies of the Assessor if Made Subject to Civil Service Must be Specially Classified and Examined.

February 24th, 1912.

Gentlemen: I am in receipt of your request of February 15th, 1912, as follows:

"The Charter provides that during four months of the year the Assessor may appoint not more than one hundred clerks, who shall each be paid at the rate of not more than \$100.00 per month during the time of their employment.

We respectfully request that you advise us as to whether or not Civil Service Clerks should be certified for appointment to these extra clerkships."

In addition to the above I am in receipt of a communication from the City and County Assessor in which he says:

"Relative to the duties and employment of extra deputy assessors, I submit herewith the following statement.

These employees are employed to represent the assessor, and perform certain duties required of him by law. Among these are listing property of the tax payer, and administering the oath, which the law requires the tax payer must make to the Assessor. Other duties are collecting the State poll tax, and giving in the name of the assessor the official receipt therefor, which the law provides. The performance of these duties makes it necessary that the employee should be a deputy assessor, and that he should have a knowledge of the revenue laws of the State. * * *

It has been my practice inaugurated a number of years since, before appointing such deputy assessors to furnish them with the revenue laws relating to their duties, and examine them after they have had an opportunity to familiarize themselves with the same, as to their efficiency therein. * * *

The Civil Service Commission has no classified list for county assessor's deputies, and have never, in any of its examinations for ordinary clerks or other examinations, propounded any question relating to the duties of deputy assessors, or to the knowledge necessary to fill this position.

The economical and efficient handling of my force requires frequent shifting of men to different duties, requiring that they have the authority to act as deputy county assessors, both in the office work and field work.

Yearly, nearly one-half of these deputy assessors, are men who have had from one to five years experience in these positions.

The efficiency of the office work would be greatly impaired, were it decided that these positions were to be filled from the certified list of 'ordinary clerks,' in view of the fact that such list has been constituted in the manner stated."

Opinion.

It will be noted from the above that whereas your communication asks whether or not Civil Service "Ordinary Clerks" should be certified for appointment to certain extra clerkships provided for in the Charter, that the Assessor's communication

on the same subject sets up a claim that these positions are not the positions of extra clerks but rather that of Deputy Assessor. The Charter, Article IV, Chapter IV, dealing with the Assessor, provides:

“He may appoint a chief deputy, who shall receive an annual salary of twenty-four hundred dollars; one cashier who shall receive an annual salary of eighteen hundred dollars; six assistant deputies, who shall receive an annual salary of eighteen hundred dollars each; twenty-one clerks, who shall each receive an annual salary of twelve hundred dollars; and during four months of the year not more than one hundred clerks, who shall each be paid at the rate of not more than one hundred dollars a month during the time of their employment.”

In the first place, if it be granted that these positions are nothing more than extra clerks, and if your Commission regularly classified “Ordinary Clerks” as being a class of municipal employees intended by your Commission for certification to the Assessor’s office for such position of extra clerks, as provided for in the Charter during four months in the year, and regularly held examinations resulting in such an eligible list being created, then such ordinary clerks would undoubtedly be entitled to these positions. However, such classification by your Commission, or, at least, the holding of examinations to make up an eligible list for such extra clerks for certification to the Assessor’s office must have been done subsequent to October 10, 1911, for prior to that date, the Assessor’s office being a county office, was not subject to the Civil Service provisions of the Charter and so it was not within the powers of your Commission prior to that date to make up an eligible list of clerks for such certifications. However, on October 10, 1911, Section 8½ of Article XI of the State Constitution was amended providing that any Sections of the Charter of this City and County theretofore adopted which attempted to bring such a county office under the provisions of the Civil Service were validated. Therefore the Assessor’s office since that amendment, as I advised you under date of January 18, 1912, is subject to the Charter Civil Service provisions, and

your Commission might now make up an eligible list of ordinary clerks to fill such positions of extra clerks in the Assessor's office. But from the records furnished me by your Commission I have ascertained that this has not been done, although an attempt was made in May, 1900, to do so, by the publishing of a notice by the Civil Service Commission as follows:

"Public notice is hereby given that a competitive examination, under the rules and regulations of the Civil Service Commission, of applicants for the position of Ordinary Clerks, Division A, Class III, will be held by the Civil Service Commission, Friday, May 25, 1900, at 8 P. M. * * * This examination will cover all extra clerks in the offices of the Assessor, Auditor, Tax Collector, Election Commissioners and all extra and ordinary clerks that are now or may be hereafter employed in the other departments of the City Government."

Under this call an examination was held and an eligible list of ordinary clerks was made up. It will thus be seen that an attempt was in this case made by the Civil Service Commission to include the office of the Assessor as being covered by this examination for "Ordinary Clerks." However, this was, at that time, beyond the powers of the Civil Service Commission, the Assessor's office being a county office and the Charter sections on Civil Service not being applicable thereto. Subsequently, in the year 1903, another examination was held for "Ordinary Clerks," and the Resolution of the Civil Service Commission at that time read as follows:

"Resolved that an examination for positions as ordinary clerks be held in the auditorium of the Girls' High School on Saturday, May 9, 1903, commencing at 1 p. m.: that this examination be held to fill temporary clerkships in the offices of the Board of Election Commissioners, the Auditor and the Tax Collector, and all other temporary clerkships under Civil Service jurisdiction not otherwise provided for."

Thereafter an examination was held, under the terms of this Resolution, for "Ordinary Clerks," and such an eligible list

was made up. It will be noted that the Assessor's office was eliminated at this time, it apparently being understood by the Civil Service Commission that this office was not then subject to Civil Service in this City and County. Subsequently, in the year 1909, the class "Ordinary Clerks" was changed in name to "Clerks Class A," and all eligibles upon the eligible register of "Ordinary Clerks" were ordered transferred to said classification "Clerks Class A"; and thereafter an examination was held for such "Clerks Class A." The Resolution of the Civil Service Commission passed March 23, 1909, provided as follows:

"That applicants who qualify in this examination be eligible only for appointment to temporary clerkships in the offices of the Auditor, Tax Collector, Board of Public Works, Board of Election Commissioners, Board of Health, Police Department, Fire Department, Department of Electricity and all other offices or Departments under the jurisdiction of the Civil Service Commission. That said temporary clerkships shall never, in tenure, exceed a period of four (4) months continuous service in any one department."

Thereafter an examination was held and an eligible list of "Ordinary Clerks" was made up by the Civil Service Commissioners. It will be noted that here again the office of Assessor was eliminated in the call for examinations for "Clerks Class A" (Ordinary Clerks.)

Subsequently on March 7, 1910, the name "Class A" was changed to again read "Ordinary Clerks."

In my opinion, the attempt of the Civil Service Commissioners in 1900, to include the Assessor's office as being subject to Civil Service being without authority of law, the examination for "Ordinary Clerks" and the making up of an eligible list of "Ordinary Clerks," so far as it was attempted to make these "Ordinary Clerks" eligible for the four months temporary clerkship positions in the Assessor's office, had no effect whatever. This being so, the constitutional amendment of 1911, which made valid the provisions of the Charter plac-

ing the Assessor's office under Civil Service, did not in terms or by implication affect the invalidity of the holding of said examination by your Commission. Section 8½ of Article XI of the Constitution, as amended, merely says that

“Where a City and County government has been merged and consolidated into one municipal government, it shall also be competent, in any charter framed under said Section 8 of said Article eleven, or by amendment thereto, to provide for the manner in which, the times at which and the terms for which the several county and municipal officers and employees whose compensation is paid by such City and County, excepting the judges of the Superior Court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for their compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. *All provisions of any charter of any such consolidated city and county heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid.*”

That is, Section 11, Article XIII of the Charter, which Article deals with Civil Service, and which states that “the provisions of this Article shall apply to the following officers and departments of the City and County * * * the Assessor * * *”, and which had been of no effect because the Assessor's office was a County office, was, by this constitutional amendment made effective, so that, although the Charter Section was adopted prior to the constitutional amendment it was nevertheless from the date of the constitutional amendment given life and practical force in this city and county. But the constitutional amendment does not state in terms nor impliedly that any action which had previous to the amendment been taken by the Civil Service Commission of this City and County under the Charter Section when that Section was inoperative, were validated or revitalized. The situation is the same as if, when the examination for “Ordinary Clerks,” Assessor's office, was held there was no Charter Section at all on

the subject, and then in 1911, a Charter Section had been adopted which reached the Assessor's office. Such a Charter Section would not, of course, be retroactive, and so, the constitutional amendment is not retroactive except in so far as by its terms it is made so, and it is made so simply to the extent of validating the Charter Sections already adopted. This made unnecessary the amending of the Charter, but it did not ratify and breathe life into proceedings taken by the Civil Service Commission under a void Charter provision. Indeed, the Resolutions of the Civil Service Commission of 1903 and 1909, restricted the application of the "Ordinary Clerks" eligible list to officers or departments under the jurisdiction of the Civil Service Commission.

If it be granted that the positions which are to be filled in the Assessor's office are these extra clerkships for four months provided for in the Charter, it appears, then, that your Commission has not, under any warrant of law created any list of clerks for such positions in the Assessor's office. Therefore, answering your inquiry, the Civil Service "Ordinary Clerks" cannot by your Commission be certified for appointment to these extra clerkships in the Assessor's office.

If, on the other hand, these positions be, in fact, as described by the Assessor, that is, the places of assistant deputies, and if the one hundred of such deputies so appointed by the Assessor have been appointed in accordance with the provisions and requirements of the Charter, then, of course, it is apparent that the ordinary clerks, even though they were properly listed for the positions of extra clerks in the Assessor's office, would not be eligible for any such positions; and it would be necessary for your Commission, if it wished to place such positions under your jurisdiction, to make up a list of eligibles known as assistant deputies in the Assessor's office. This point has been passed upon by my predecessor Franklin K. Lane, in an opinion under date of February 17, 1900, given to the Assessor and in which he was asked the following question: and advised as follows:

February 17, 1900.

“The Assessor:

Sir: Your communication of January 15th at hand, which reads as follows:

‘Article IV, Chapter IV, Section 1 of the Charter provides the Assessor shall have six (6) assistant deputies, twenty-one (21) clerks and not more than one hundred (100) clerks during four months, etc.

‘Has the Clerk the authority to administer the oath required in filing a statement? If not, would it be legal for the Board of Supervisors, under provisions of Article XVI, Sec. 35, to appoint 21 deputy assessors and one hundred (100) deputy assessors in lieu of the same number of clerks?’

The term clerk is thus defined in Bouviers’ Law Dictionary: ‘A clerk is one employed in an office, public or private, for keeping records or accounts, whose business it is to write or register in proper form the transactions of the person, tribunal or body, for which he is clerk.’ This definition is cited and approved in *People vs. Fire Commissioners*, 73 N. Y. 437, 442.

In *Throop vs. Langdon*, 40 Mich, 673, the question of a clerk’s position was considered at length in a quo warranto of chief clerk in the City Assessor’s office. The clerk had been appointed by the City Council under its powers, and had a tenure independent of his superior. The court held that a clerkship is not an office but an employment and that a clerk is a mere employee.

In *Rauer vs. Lowe*, 107 Cal., 229, it is held that a mere clerk or employee cannot be empowered by the official appointing him to perform official acts though those acts could be performed by a deputy, and the officer had power to appoint a deputy. This holding was sustained on motion for rehearing and was followed in *Warren vs. Ferguson*, 108 Cal., 535.

It would appear beyond the power of your appointees as clerks to administer oaths and otherwise perform the work of deputies. But the Charter contains the following provision:

‘Every assistant, deputy or other subordinate of any board, department or officer, shall discharge any of the duties pertaining to such department, board or office as his chief may assign him to.’ (Sec. 30, Art. XVI.)

While under this provision the head of a department or office has the power to assign his assistants, deputies and other subordinates to such duties as he may see fit and require of them compliance with his directions in this regard, it does not expressly grant to any officer the power to convert a clerk into a deputy having powers coextensive with those of his chief. The question is one of powers, not of duties. And while it may be that the courts would hold that by requiring the duty it was necessarily to be implied that the full powers necessary for the exercise of such duties were also granted, I deem it unwise to rely upon such provisions. (See *People vs. Cohen*, 118 Cal., 74.)

The Political Code (Sec. 4112) says that ‘every county and township officer, except County Judge, Supervisor and Justice of the Peace, may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office.’ But this provision is limited by Section 8½ of Article XI of the Constitution, which makes it competent in all freeholders’ charters to provide for the number of deputies that each county officer shall have. It has been provided in the Charter that the Assessor shall have one chief deputy and six assistant deputies. There is, however, another provision of the Charter under which with consent of the Mayor and Supervisors additional deputies may be provided (Art. XVI, Sec. 35), and I have no doubt but that it would be legal if such deputies as are needed were appointed under this provision.”

I subscribe to the above views of former City Attorney Lane, and am of the opinion that if the duties and qualifications of this help is as the Assessor above describes, that the position of such employees would be that of a deputy and not of a clerk and could not be filled from the list of “Ordinary Clerks,” even though these “Ordinary Clerks” were eligible to certification to the Assessor’s office as extra clerks. Under the

first classification made by the Civil Service Commission on February 6, 1900, Class III of the Clerical Service was known as "Ordinary Clerks"; Class VIII as "Office Deputies." In the classification of 1901 by the Civil Service Commission Class V of the Clerical Service was designated as "Ordinary Clerks" and classes, XI, XII, XIII, XIV and XV, were designated as deputies in the following offices respectively: Auditor's office, Tax Collector's office, Election Commission, Office, Board of Public Works, Field, Board of Public Works. In 1909, the Civil Service Commission changed this classification of the Clerical Service designated "Ordinary Clerks," to "Clerks Class A," and Classes VII, VIII, IX and X of the Clerical Service being designated as Deputies in the following offices respectively: Auditor's office, Tax Collector's office, Election Commission, and Office, Board of Public Works. In the classification made in 1910 by the Civil Service Commission of the Clerical Service Class III was designated as "Ordinary Clerks," and Classes X, XI, XII and XIII are designated under Deputies in the following offices respectively: Auditor's office, Tax Collector's office, Election Commission, and Office, Board of Public Works. It thus appears that your Commission has never classified Deputies in the Assessor's office as being subject to Civil Service.

In the Resolution of May 4, 1900, the Civil Service Commission stated that the examination for "Ordinary Clerks" would cover "all extra clerks in the offices of", etc., etc., and "all extra clerks and ordinary clerks, etc."

On May 28, 1900, the Civil Service Commission by Resolution provided as follows: "The following subjects were adopted as the schedule of subjects for the examination of 'Ordinary Clerks' and their respective weights were fixed as follows: Arithmetic 4, Experience 2, Copying from rough draft, including spelling, punctuation and capitalization 2, Letter Writing, including handwriting and composition 2." The credit for experience was simply for general clerical experience with no particular reference to experience in the Assessor's office.

For the examination held in 1903, the Resolution of the Civil Service Commission of April 15, 1903, provided that the examination be held "to fill temporary clerkships in the offices of", etc., etc., and further that the scope of this examination be as follows:

General knowledge of duties.....	4
Handwriting	3
Arithmetic	2
Spelling	1

The examination questions under this examination did not include any questions relating to the Assessor's office.

In 1909, the Resolution of the Civil Service Commission of March 23rd of that year provided that the applicants who qualified at the examination for "Clerks, Class A" (Ordinary Clerks), would be eligible for appointment to "temporary clerkships in the offices of", etc., etc. That the following be the scope of the examination for such clerkships:

Spelling	1
Arithmetic	2
General knowledge of duties.....	4
Penmanship and neatness.....	2
Experience.....	1

The examination questions under this examination did not include any questions relating to the Assessor's office.

It will be seen from the above that "Ordinary Clerks" have never been considered by the Civil Service Commission as Deputies and have never been examined for the duties incumbent upon a Deputy in the Assessor's office as described in the above communication from the Assessor.

I am therefore of the opinion that, assuming the positions which are to be filled by the Assessor to be those of Assistant Deputies in his office, which positions for the purposes of this opinion, I assume to have been lawfully created, then said positions cannot be filled by clerks from the "Ordinary Clerks" list. But that if your Commission desires to make

such positions subject to its control it must classify them as "Deputies, Assessor's Office", and hold examinations for the purpose of making up an eligible list of such "Deputies, Assessor's Office".

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Powers of the Board of Supervisors Relating to Home Telephone Co. Selling its Properties to Pacific Telephone & Telegraph Co.—Effect of Filing Petition Under Initiative Provision of the Charter.

February 26th, 1912.

Gentlemen: I have the request of your Public Utilities Committee which reads as follows:

"The Public Utilities Committee wishes your advice as early as convenient on the status of the Board in re the Telephone merger case.

The Public Utilities Committee and the Board desire to know what powers and limitations it now has in dealing with the petition of the Home Telephone Company for permission to sell its physical properties to the Pacific Telephone and Telegraph Company and to surrender its franchise back to the City.

As you know, a petition has been filed calling a special election to ask the people to determine upon its policy of the merger, and also proposing a bond issue for the purchase of the Home Telephone plant and establishment of a Municipal Phone system.

Does the filing of the petition mentioned tie the hands of the Board of Supervisors?

Can the Board proceed to grant or deny the petition as it deems for the best interest of the public?

Does the filing of the petition under the initiative provision of the Charter suspend all functions of the Board of Supervisors in this particular matter?"

There are two ordinances contained in the initiative petition referred to in your communication—one purports to be a declaratory ordinance and has for its object the declaration of the public interest and necessity for the acquisition of a telephone system, the other purports to be an Ordinance calling a special election to vote upon the question of the acquisition by the City of the present system of works of the Home Telephone Company.

In the first ordinance is found (Section 2) a declaration that the cost of the proposed utility will exceed, in addition to the other expenses of the City and County, the income and revenue provided for the City and County for any one year, and also a declaration (Section 5) that the "public interest and necessity require that any merger of the telephone systems of the said Bay Cities Home Telephone Company and The Pacific Telephone and Telegraph Company, and the requested permission of the City and County of San Francisco, to so merge said system, be disapproved, rejected and defeated, and that said Bay Cities Home Telephone Company be not released from any of its contracts, bonds, or other obligations to said City and County of San Francisco."

Section 11 of Article II of the Charter provides that—

"An ordinance shall embrace but one subject which subject shall be expressed in its title."

Section 5 of Article XII of the Charter provides:

"Whenever the Board of Supervisors shall determine that the public interest or necessity demands the acquisition, construction or completion of any public utility or utilities, it shall specifically declare such determination by an Ordinance, which shall also direct the Board of Public Works to procure and file plans and estimates of the cost of original construction and completion of such public utility or utilities."

The framers of the ordinance have confused the method provided for the acquisition of public utilities with the method provided for the issuance of bonds for public improvements. In the former case, the Charter provides that, in the declaratory ordinance, the Supervisors must call for plans and estimates of the cost of original construction of the utility named and that, "before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities, the Board of Supervisors must solicit and consider offers for the sale to the City and County of existing utilities in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

This having been done, and the Board having before it both the estimates of cost of original construction and the offer of sale of the existing utility, it must then determine whether it will proceed by original construction or purchase. Having determined its course if the estimates of cost, or the offer of sale, as the case may be, are sufficiently low the Board "shall enter into such negotiations and contracts as may be necessary for the acquisition of the same," (the utility proposed to be acquired).

"If however, (Section 5, Article XII) the cost of such public utilities, or any of them, shall so far exceed the annual revenues of the city and county * * * as to render it necessary to incur a municipal bonded indebtedness therefor, the Board of Supervisors shall, at any regular meeting held within eight weeks after the filing of plans and estimates of cost thereof, by ordinance call a special election, etc."

For the purpose of issuing bonds for public buildings, public improvements, or the acquisition of lands, Section 29 of Article XVI of the Charter, authorizes the Supervisors to determine, in the declaratory ordinance that a bond issue is necessary because the cost of the proposed improvement will exceed the annual revenue, in addition to the necessary annual expenses. The Board cannot, however, in such ordinance, determine the **amount** of the proposed bond issue, such

determination being dependent upon the report of the Board of Public Works containing the estimates of cost.

In the first instance the gravamen of the declaratory ordinance is that the public interest and necessity demand the acquisition by the City of the public utility mentioned, in the second it is that a bond issue is necessary to carry on necessary municipal improvements which otherwise should naturally be paid for from the annual revenues.

Section 5 of the proposed ordinance is merely a declaration of policy and is not germane to the subject matter of the ordinance. The people having determined the necessity of the acquisition of a telephone system, the sale or merger of the system and works of the Home Telephone Company should not affect the proceedings looking to such acquisition. From the ordinances proposed to be submitted it appears that no offer of sale to the City has been made by the Home Telephone Company, and that no offer is to be solicited as is required by the Charter. If it is possible to acquire this system in the manner proposed, the sale or merger could not in any way affect the right or power of the City to acquire it either by purchase or by condemnation.

Such being the case it follows that the sale or merger of this system will in no way affect the power of the city, by proper proceedings to acquire a telephone system, either by original construction or by purchase and that, consequently, the provisions of Section 5 of the proposed declaratory ordinance are either mere surplusage, which should be disregarded, or that they really express the main purpose of the ordinance so as to make the entire ordinance invalid as containing two distinct and non-relative subjects.

Then again the framers of the ordinances have confused the method of initiating proceedings for the acquisition of public utilities with the method of adopting ordinances upon initiative petitions. Sections 3 and 4 of Article XII of the Charter provide a complete method by which the people may initiate the proceedings for the purpose of acquiring public utilities. By this method when a petition is filed containing

the verified signatures of electors equal to fifteen per cent of the entire vote cast at the preceding general election, setting forth that the signers favor the acquisition of a certain public utility, it becomes the duty of the Supervisors to pass the necessary ordinance calling for plans and estimates of original construction, soliciting offers of sale of existing utilities, and calling and giving notice of the special election. This method is complete and, I believe, is exclusive of the method provided in Chapter 3 of Article XI for the adoption of ordinances by vote of the people. If this were not the case the acquisition of public utilities by the initiative would be surrounded by such difficulties as would make the proceedings impracticable and almost impossible. The people would have to vote blindly to incur a bonded indebtedness of millions of dollars without any knowledge of the value of the utility proposed to be acquired or the cost of original construction by the City.

Then again, the method here proposed entails a double expense upon the City as two elections must be held—one for the declaratory ordinance and one to authorize the bonds, while with the other method but one election is necessary, the filing of the petition with the Supervisors having the same effect as the adoption of the declaratory ordinance by the people.

I am not unmindful of the provision of Section 13 of Chapter III of Article XI of the Charter, which authorizes the people, by the initiative, to adopt a general declaration of policy, which it shall be the duty of the Board of Supervisors to carry into effect by the adoption of the necessary ordinances, but there is no attempt to comply with this section in this petition. Furthermore, the Section contemplates positive and not negative action, “it shall thereupon be the duty of the Board of Supervisors or other legislative body to enact an ordinance or ordinances to carry such policies or principles into effect.”

Assuming, however, for the time, that the proposed ordinance is in proper form and that it would be a valid ordi-

nance if adopted, it does not follow that the Supervisors are prevented, pending the election, from taking such proceedings as may be expedient in the matter. The Charter does not provide that, when an initiative petition is filed, it suspends action on the part of the Supervisors. The Board may, pending the election, adopt in the usual manner the same ordinance which is to be submitted to the electors, or may adopt a measure having the opposite effect. The result would be that if the ordinance submitted to the electors should meet with their approval it would supersede the one passed by the Supervisors, where in conflict, and if it should fail to receive such approval the ordinance passed by the Supervisors would stand.

From the foregoing it results that the Board of Supervisors may take any action in the matter which may be deemed advisable notwithstanding the initiative petition. If it be desired to have an expression of the will of the people upon the question of the proposed merger, proceedings must be taken under the terms of Section 2 of Chapter IV of Article XI of the Charter, known as the referendum proceedings. Under the terms of this Section, the Ordinance may be submitted to the vote of the people at a general or special election;—(at a special or general election by a vote of a majority of the Board; or at a general election, by a vote of one-third of the Supervisors, or by the Mayor.)

I have not discussed the many apparent errors in the second ordinance contained in the petition, being satisfied that, notwithstanding the filing of the petition, the hands of the Supervisors are not stayed, and that the evident illegality of the so-called declaratory ordinance would defeat and render ineffective all proceedings attempted to be initiated thereby.

It should not be assumed that the foregoing views should in any way affect the action of the Board of Election Commissioners upon the petition as filed. If the petition is found to contain the necessary valid signatures it becomes the duty of the Election Commissioners to call and provide for a special election to enable the people to vote upon the ordinance, not-

withstanding the fact that the ordinance as adopted would be void and the election thus a useless act.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Recorder May Collect Fees for Recording Instruments of
Panama-Pacific International Exposition Co.**

February 27th, 1912.

Sir: I am in receipt of your communication which reads as follows:

“Will you please inform me if all or any instruments or notices executed by or for the Panama-Pacific International Exposition Company are entitled to filing or recording in this department without payment of the usual fees?”

The Panama-Pacific International Exposition Company is a corporation organized under the laws of the State for the purpose of commemorating the completion of the Panama Canal. That purpose is a semi-public purpose and as such has received recognition in the constitution and legislation of the State.

Section 22 of Article IV of the Constitution provides for the raising of \$5,000,000 by the State through taxation to be expended by a commission to be known as the Panama-Pacific International Exposition Company in establishing, maintaining and supporting in San Francisco an exposition in commemoration of the completion of the canal. Likewise, by an amendment to the Charter of San Francisco, bonds to the extent of \$5,000,000 have been authorized by the people of San Francisco, the proceeds of the sale of which are to be turned over to the Panama-Pacific International Exposition Company.

Although partaking of this public nature, I know of no statute or law, however, which exempts the Exposition Company from paying any statutory fee for recording an instrument by the Recorder. The collection of fees by the Recorder is purely statutory in character and to entitle a person or corporation to exemption from paying the fees there must be an express exemption by statute.

Section 22 of Article IV of the Constitution in part provides:

“No tax, license fee or charge of any kind or character shall ever be levied or assessed or charged against any property of said Panama-Pacific International Exposition or against any property used or exhibited therein while being used or exhibited in connection therewith.”

The term “Panama-Pacific International Exposition” used in the foregoing section of the Constitution, refers not to the corporation known as the Panama-Pacific International Exposition Company, but to the Exposition itself that will be held in commemoration of the completion of the Panama Canal.

Extending the constitutional provision to include all property of the Panama-Pacific International Exposition Company the provision is not broad enough, however, to exempt the Company from paying fees to the Recorder for the recording of instruments. The language is, “No tax, license fee or charge shall be levied or assessed or charged against any *property* of said Panama-Pacific International Exposition.” A tax, license fee or charge against property is such a tax, license fee, or charge which amounts to a lien upon the property and which the property itself must discharge.

The fees exacted by the Recorder are not a lien or charge upon any property of any one. It is required in advance to the filing of the instrument with the Recorder and the Recorder acquires no lien upon any property as security for the payment of these fees.

In my opinion the provision of the Constitution above quoted refers to those taxes, fees and charges levied or

assessed against property upon which the holder of the same could proceed against the property for payment or satisfaction, such as taxes, license fees and assessments levied by the State or City.

I am therefore of the opinion that inasmuch as no statute exempts the Panama-Pacific International Exposition Company from paying fees to the Recorder for the recordation of instruments, that Company must pay the statutory fees of the Recorder notwithstanding the semi-public character of the Company.

Respectfully,

PERCY V. LONG,
City Attorney.

The Recorder.

The Auditor May Refuse to Audit Demands Which Are in Fact Separate but Which are Presented as Joint Demands.

February 29th, 1912.

Gentlemen: I am in receipt of your communication which reads as follows:

“Kindly advise this Board whether the demands for salaries of the officer and members of any given company of this department may be embodied in one instrument as per the following form:

‘The undersigned members of Hook and Ladder Co. * * * of the Fire Department present this demand on the Treasury of the City and County of San Francisco for the sum ofDollars, the same being for salaries as members of said Hook and Ladder Company for the month of1912.

‘By these presents we do hereby make, constitute and appoint.....our true and lawful attorney for and in our name, place and stead, to collect our salaries herein mentioned.’

(Then follows the names, positions and amounts, each 'member signing his own name thereto.)

'This demand is authorized by Art. III, Chapter IV, Art. 'IX, Chapters I, II, IV and VIII of the Charter of the 'City and County of San Francisco.'

"This form of demand is deemed desirable for the department and has always been in use until some eighteen months ago, for the purpose of facilitating the amount due the individual members and also to determine the assignment of salary warrants by members of the Department.

"Stating the proposition a trifle differently: Is there any provision of the Charter which requires that the salary demands of the members of a company be made individually to each and every member thereof, or may not one document evidencing the salary demand of all the members thereof be issued, said document to be signed by each officer and member whose salary rights are so evidenced thereby in the manner and wise by the Charter subscribed.

"Trusting that you will kindly advise this Board on this matter at your earliest convenience, we remain."

The difficulty with the demand in its present form is this: the members of a Fire Company present a demand on the Treasurer for a lump sum, which sum is the total amount due the several members of the company. The demand is a joint demand on behalf of the members of the Company for the total amount stated in the demand. A joint demand however presupposes a joint obligation. In other words, the demand presupposes that the City is obligated to the members of the Company jointly for the total amount stated in the demand. The obligation between the City and the several members of the Department, however, is an individual obligation resting upon individual contracts and it is not possible to change the individual contracts into joint contracts. For that reason it is my opinion that the Auditor would be justified in refusing to audit the joint demands.

I see no reason, however, why the several members of the Company could not present their several demands against

the Treasurer upon the same sheet of paper. The Charter merely requires that demands against the Treasurer should be presented to the Auditor in written form, but there is no provision which prevents persons holding several demands against the City from presenting them on the same sheet of paper. In other words, I am of the opinion that the demand would be proper if it read substantially as follows:

“The undersigned members of hook and ladder company of the Fire Department present their several demands on the Treasurer of the City and County of San Francisco for the amounts set opposite their respective names, the same being for salaries as members of the said hook and ladder company for the month of....1912,” the demand in other respects following the form suggested in your communication. The Auditor could approve the several demands, disallowing, however, a demand from an individual which is improper and which, under the law, he cannot allow. In my opinion this would be a legal demand and would comply with the requirements of the Charter. Of course, the most convenient method of presenting demands is a matter for arrangement between the Auditor and the Fire Department. This is a matter with which I cannot be officially concerned, the legality of the demand being the only thing on which I am required to pass.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

**Contracts for School Buildings Authorizing Payments in
Bonds Cannot be Entered Into.**

March 4th, 1912.

Gentlemen: I am in receipt of your communication of February 26th, as follows:

“Please be advised that the Board of Supervisors today adopted the following Resolution:

Resolved, that the City and County Attorney be requested to report at his earliest convenience, if in his judgment, contracts for School buildings to be built upon specifications in which it is expressed that payment will be made by Bonds of the City which it has been unable to sell at par instead of in money, is legal, and is permissable under the Charter; and that he be requested to suggest any other means by which the unsold bonds can be utilized for the purpose for which they were issued."

I understand that the bonds you refer to are some of the issue of July 1st, 1904, which were authorized at a bond election held in this City on September 29th, 1903, for the purpose of constructing school houses, and which, because no bid has ever been offered for them, have been placed with the Treasurer for sale at par, in accordance with the terms of Section 10 of Article XII of the Charter.

Opinion.

Article XVI, Section 29 of the Charter provides that, in the case of the issuance of bonds for the construction of such school buildings as you refer to, the provisions of Article XII ("acquisition of Public Utilities") shall apply "so far as the same are applicable * * * to the issuance, character and registration of said bonds, and to the time when, and the kind of money in which said bonded indebtedness shall be payable.

The proceeds of sale of bonds shall be placed in the treasury to the credit of the proper fund and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing the issuance until such objects are fully accomplished, after which, if any surplus remains, such surplus may be transferred to the general fund", etc. etc.

We see in this section that it is required that the bonds be sold for cash, and it is thus apparent that the charter does not permit of their being disposed of as your communication suggests, that is, by being given in payment for the construction of school buildings.

And when we turn to Article XII, ("acquisition of Public Utilities") which is thus incorporated, so far as applicable, as a part of the scheme for issuing these bonds for the purposes of school construction, we see this point brought out still more forcibly.

At the time that the issuance of these school bonds was authorized, in 1903, Section 10 of this Article XII read:

"Such bonds * * * must be sold for cash in lawful money of the United States, as aforesaid, to the highest bidder at not less than par, after having been advertised in the official newspaper. They shall be sold under sealed proposals. * * *"

And then followed the provision that the proceeds of the sale of bonds shall be placed in the treasury, etc., etc., just as we have seen in Section 29, Article XVI above.

This Section 10 of Article XII was amended in 1907 as follows:

"When such bonds are offered for sale they shall be advertised in the official newspaper and otherwise if so ordered by the Supervisors and sealed proposals for the purchase of the whole or any part thereof shall be opened at the time specified in such advertisements. * * * Bonds shall be sold to the highest bidder for not less than par, but the Supervisors shall have the right to reject any or all bids made for the purchase thereof. If less than the amount of the bonds offered shall be sold, the Supervisors may, with the concurrence of fourteen members and the Mayor, place such unsold bonds on sale at the City Treasury, * * * and such bonds may be sold to any applicant at such prices as may be fixed by the Supervisors, provided that such prices shall not be less than par and accrued interest."

and then follows, again, the provision for placing the proceeds of any sale of bonds in the treasury.

The Charter could not be more explicit in thus prohibiting the disposing of these bonds in any way except for cash, at not less than par. Furthermore, such sale must be made

prior to the entering into any contract for the work as the money must be in the treasury before the contract is entered into, Section 10 of Chapter I Article III of the Charter providing that

“No contracts made, the expense of whose execution is not provided by law or ordinance to be paid by assessments upon the property benefited, shall be binding or of any force, unless the Auditor shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the board or officer making the same. * * * The Auditor shall make such indorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount so specified by the officer making the contract, and thereafter shall hold and retain such sum to pay the expense incurred until the contract shall be fully performed. * * *”

I am, therefore, of the opinion that the Charter forbids such a method of including in the specifications or contracts for school buildings the condition that payment shall be made by bonds of the City. I call your attention to that portion of Section 10 of Article XII which provides for the cancellation of unsold bonds.

“If the bonds or any of them offered for sale shall remain unsold the Supervisors may so declare, and may, with the concurrence of fourteen members and the Mayor, cancel such unsold bonds, provided that no bonds shall be cancelled as aforesaid unless the same have been offered for sale by advertisement, as above provided, at least three separate times, at intervals of not less than thirty days, and provided that no such bonds shall be cancelled by the Supervisors as aforesaid for which par or above has been bid by any bona fide responsible bidder or bidders.”

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

An Application for Pension Having Been Denied by the Pension Fund Commissioners There is no Power to Reopen the Question.

March 7th, 1912.

Gentlemen: I am in receipt of your communication of March 6th, as follows:

"We respectfully request an opinion from you upon the following matter: William R. Van Keuren was appointed a member of the Police Department on January 11th, 1890, was promoted to the rank of Corporal on October 15th, 1907, and died on December 16th, 1910, the death certificate being signed by Dr. Thomas E. Schumate giving the cause of death as 'Chronic Hypertrophy of the Heart.'

His widow, Mary Van Keuren, filed an application with the Board of Police Relief and Pension Fund Commissioners on December 30th, 1910, and asked to be allowed a monthly pension of one-half of the salary attached to the rank held by him at the time of his death, under the provisions of Section 4, Chapter X, Article VIII of the Charter, claiming that shortly prior to April 18th, 1906, her deceased husband was injured in the performance of his duties, which injuries caused his death on the said 16th day of December, 1910.

The said application was given a full hearing before the Board of Police Relief and Pension Fund Commissioners on January 5th, 1911, and after hearing the testimony of a number of witnesses for the petitioner, the application was continued until February 2nd, 1911, on which date the application was denied.

Subsequently the widow, Mary Van Keuren, filed a new application under the said provisions of the Charter, which application was withdrawn, without prejudice, by her attorney on April 12th, 1911.

On March 4th, 1912, the said Mrs. Mary Van Keuren filed an application with the Board of Police and Relief Fund Commissioners for a rehearing of her application for a pension under the said provisions of the Charter, and at a meet-

ing of the said Board held on March 5th, 1912, the matter was referred to you for an opinion as to whether or not this Board can legally grant a rehearing of the same."

On May 9th, 1911, I advised your Commission in the case of Mrs. William F. Brophy, who had applied for a pension on account of the death of her husband, and whose application for a pension had been denied by a former Board, as follows:

"The Board of Police Relief and Pension Fund Commissioners on November 5th, 1908, denied an identical application of Mrs. Brophy's and of course this finding of the Board cannot be overturned by the Board as constituted later. If this were not so there would be no finality to any such findings of any such Board."

Reaffirming the views as expressed in my former opinion, I again advise your Board that an application for a pension having been regularly and finally passed upon by your Board, and, having been, as a result of such determination, denied, that there is no power in your Board to reopen the question for further consideration. It is, of course, easily seen that unless this were the rule, there would be endless confusion and uncertainty, and a possibility of considerable abuse of any commission's authority in disregarding the findings made either by itself or by some former commission which had passed upon the same question.

You are therefore advised that there is no power in your Board to grant a rehearing in the case of Mrs. Van Keuren's application.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Relief and Pension Fund Commissioners.

**Fillmore Street Tunnel—Right of City to Use the Same for
Municipal Railway—For Construction and Use of this
Tunnel Present Railway Tracks May be Diverted.**

March 9th, 1912.

Gentlemen: I have your communication wherein you ask to be advised:

First. As to whether the franchise rights of the United Railroads on Fillmore Street would interfere with the City in the event that the City should desire to construct an extension of the Geary Street municipal railroad on Fillmore Street to the proposed Fillmore Street tunnel to the Harbor View Exposition site and to the Union Street car line.

Second. As to the power of your Board to direct the diversion of the present railroad tracks of the United Railroads from the center line of the street, to permit of the opening and use of the proposed tunnel.

First. No plans accompany your communication and I assume, therefore, that it is proposed to construct the Fillmore Street tunnel in accordance with the general plan outlined in the public press commencing at Sutter Street and ending at some street on the northern part of Fillmore near the proposed exposition grounds and that, accordingly, the distance proposed to be occupied on the surface jointly with the United Railroads is not more than two or three consecutive blocks.

As to the occupation of the floor of the tunnel for street railroad purposes I am satisfied that the rights of the City in this respect could not be interfered with. The right of the City to construct the tunnel in the first place has been affirmed and the power to occupy such a tunnel with a street railroad is conferred by the Charter. Under such power the City may, after having constructed the tunnel, lay railroad tracks and operate cars thereon or may lease the same to a private system. The operation of such cars does not affect the franchise rights of the company occupying the surface.

In *Peoria Ry. Co. vs. Peoria Ry. Ter. Co.*, (96 N. E. p. 689) the Supreme Court of Illinois said:

“The City may grant the right to a second company to construct and operate a street railway system over and upon its streets provided the same can be done without unnecessarily appropriating that portion of the streets which has been granted to the first company and which is being used by it in the operation in its railway system.”

And in *Long Island Ry. Co. vs. City of New York*, 92 N. E. 689, the Court of Appeals of the State of New York in an action affirming a judgment denying the right of the Long Island Ry. Company to construct and operate a surface railway after it had changed its tracks from the surface to a subway said:

“A surface railroad is separate and distinct from an underground or overhead railroad, even when directly over one or under the other; neither is a part of the other but each is an entirety in itself.”

The Court then held that it was proper to have two separate railways occupying the same street under separate franchises, one a surface railway, the other a subsurface railway.

Second. It is a well settled rule of law that the rights of public service corporations to the use of streets in municipalities are always subject to the paramount right to the use of the same streets by the municipality. So it has been held that a water company laying its pipes in a street in a city under a franchise from the city does so subject to the right of the city to construct subways in such streets whenever and wherever the public interest demands and if the construction of the municipal railroads requires the re-laying of the company's pipes it can maintain no claim against the city therefor. (*National Water Works Co. vs. Kansas City*, 28 Fed., 921). To the same effect are:

Belfast Water Co., vs. City of Belfast, Vol. 1, Mun. Corp. Cases, 231;

New Orleans Gas Light Co. vs. Drainage Com. etc., 197 U. S. 426; 49 L. Ed. 835;

Union Bridge Co. vs. U. S. 204 U. S. p. 394; 51 L. Ed. p537.

Chicago B. & Q. R. R. Co., vs. Ill. 200 U. S. p. 561; 50 L. Ed., p. 609, 610.

The case last cited involved the right of the drainage commissioners to order the plaintiff railway company to increase the height of its bridge over a non-navigable creek which the commissioners were preparing to drain for the purpose of making it navigable. The Supreme Court of the United States in holding that though the taking of private property for public use must be done in obedience to the constitutional injunction to secure just compensation to the owner such rule did not apply to a case of this nature because there was not "a taking" of private property within the meaning of the Constitution, the court saying: (50 L. Ed. p. 609.)

"We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. * * *

(Page 160.) "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury does not attach under the Constitution. * * * * The commissioners demand, however, as they may rightfully do in the public interest, a larger, deeper, and wider channel in order to accommodate the increased volume of water in the creek that will come from the proposed plan of the commissioners. But that is a matter which concerns the public, not the railway company. * * * Without further discussion we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, etc, and also (unless it abandons or surrenders its right, to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new

bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

In *New Orleans Gas Light Company vs. Drainage Commissioners* (Supra) the Supreme Court of the United States said: (49 L. Ed. p. 835.)

"We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare."

To the same effect is *Baltimore vs. Baltimore Trust & G. Co.*, 166 U. S., 673; 41 L. Ed. 1160, where the Supreme Court of the United States sustained the order of the council of the city of Baltimore requiring a street railway company occupying certain streets in that city to remove its double track street railway and to substitute in place thereof a single track.

Also see *State vs. Parsons St. Ry. & E. Co.*, 105 Pac. 704.

The franchise under which the United Railroads is operating on Fillmore Street contains a proviso that the company will construct its tracks on the streets designated as nearly as possible in the middle thereof. The same franchise contains the proviso that nothing herein shall be construed in anywise to prevent the proper authorities of this City from grading, paving, repairing or **altering** any of the streets therein specified. The franchise is also made subject to future regulations by the Board of Supervisors.

It follows from the foregoing, first, that as to the use of the floor of the proposed Fillmore Street tunnel the United Railroads could not, on account of any franchise rights held by it, interfere with the City in the extension of the municipal railroad through said tunnel. Second, that for the purpose of permitting the opening and use of the proposed tun-

nel it is within the power of your Board to direct the diversion of the present railroad tracks from the center line of the street.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Section 1714 Pol. Code as Amended is in Part Special Legislation and Unconstitutional.—List of Books Need Not be Submitted to Superintendent of Schools before Purchase.

March 12th, 1912.

Gentlemen: I am in receipt of your communication, as follows:

“Your official opinion is respectfully requested on the following questions:

First: In accordance with section 1714 of the Political Code of the State of California, must the Board of Education this year set aside the sum of \$12,270 (\$10 per teacher for 1227 teachers now in our department) for a school library fund?

Secondly: In accordance with section 1712, Subdivision 1, must the Board of Education submit to the Superintendent of Schools of this City and County for his approval the lists of books or apparatus proposed to be purchased by said Board **before** said Board may purchase them? Or, in other words, is it legal to charge to the School Library Fund the cost of any books which may be purchased without the approval of the Superintendent of Schools?”

Opinion.

In reply to your first inquiry, you are advised that Section 1714 of the Political Code, as amended by the Legislature in 1911, reads as follows:

"In cities not divided into school districts, the library fund shall consist of a sum not to exceed fifty dollars, for every one thousand children or fraction thereof of five hundred or more, between the ages of five and seventeen years, annually taken from the city or county school fund apportioned to the city. The superintendent shall apportion the library fund in cities not divided into districts among the several schools in proportion to the average number of children belonging to each school; provided, that in city and county the library fund shall consist of a sum equal to at least ten dollars for each teacher employed in such city and county."

The last clause, "provided, that in city and county the library fund shall consist of a sum equal to at least ten dollars for each teacher employed in such city and county" was added by the amendment of 1911.

In my opinion the above amendment, making a rule for the amount of money which must be appropriated for the library fund **in a city and county**, and confining this rule to a city and county only, is special legislation and as such, unconstitutional.

By Section 25, Article IV of the Constitution of our State it is provided that "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * *

Twenty-seventh. Providing for the management of common schools."

In *Earle vs. San Francisco Board of Education*, 55 Cal., 489, our Supreme Court considered the Traylor Act, which established the salaries to be paid to the teachers in the public schools "in all consolidated cities and counties containing more than 100,000 inhabitants."

The Court based its decision on the above section of the Constitution and upon Section 5 Article IX of the Constitution, which declares that "The Legislature shall provide for a system of common schools, by which a free school shall be

kept up and supported in each district at least six months in every year, after the first year in which a school has been established." The Court held the Traylor Act unconstitutional, as special legislation, saying, at page 491, "Looking at the Traylor Act, we see that it only purports to deal with salaries of teachers in consolidated cities and counties containing more than 100,000 inhabitants. Whether we take judicial notice of the fact that there is in the State one such city and county or not, we do know that this act does not make provision for the salaries of the teachers in any city, county, or district in the State, outside of consolidated cities and counties of the population mentioned, and that it is entirely confined, as to its subject and its operation, if not to a specified locality, at least to specified localities. It would seem to follow, necessarily, that it is local as contradistinguished from general, and therefore within the constitutional inhibition already quoted."

In *Kennedy vs. Miller*, 97 Cal., at 432, the Supreme Court, referring to the above constitutional requirement that "the Legislature shall provide for a system of common schools", says:

"The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the Legislature to provide 'a' system of common schools means **one** system which shall be applicable to all the common schools within the state."

We find no authorization in the Constitution for classifying school districts upon any basis whatever. Section 5 of Article XI does authorize the classifying of *counties by population*. Section 6 of Article XI authorizes the classifying by general laws, of *cities and towns*, "in proportion to population."

Another case decided by our Supreme Court to the effect that special laws for the management of common schools are not valid, is *Bruch vs. Colombet*, 104 Cal., 347, where it was held that it could not be lawfully provided that in cities **having a board of education** the city treasurer is to have the

custody of state and county school money, whereas, in other school districts the county treasurer is to have this custody.

I am further of the opinion that this provision is invalid because unreasonable. San Francisco is a county of the second class. Los Angeles is a county of the first class. If San Francisco should furnish a minimum of \$10 per teacher for libraries, Los Angeles should also do so. There is no reason apparent for this discrimination, requiring a greater contribution for the library fund from San Francisco than say from Los Angeles County. Or, if we consider San Francisco, as a city of the first class and Los Angeles as a city of the first and one-half class, there is no apparent reason why the rule should be different in the one city than it is in the other.

Answering your second inquiry: Section 1712, Subdivision I of the Political Code provides as follows:

“The Board of School Trustees and the city or board of education in any city must expend the library fund, together with such moneys as may be added thereto by donation, in the purchase of school apparatus and books for a school library, including books for supplementary work; and no warrant shall be drawn by the superintendent of schools upon the order of any board of trustees against the library fund of any district unless such order is accompanied by an itemized bill, showing the books and apparatus, and the price of each, in payment of which the order is drawn, and unless such books and apparatus have been adopted by the county, or city, or city and county board of education. All orders of the trustees and of boards of education for books or apparatus must in every case be submitted to the superintendent of schools of the county, or city, or city and county, respectively, for his approval, before said books or apparatus shall be purchased.”

Section 1771, Subdivision 5 of the Political Code refers to this Subdivision 1 of Section 1712 as follows: “County Boards of Education have power to adopt a list of books and apparatus for district school libraries and books for supplementary use in elementary schools in their respective

counties and cities and counties, as required by section seventeen hundred and twelve of the Political Code; provided, that no pupil shall be required to purchase said supplemental books, and pupils must be expressly notified by teachers that it is not required or desirable that such books for such supplemental use be purchased by pupils or parents. When supplemental books are purchased they must be paid for by the school district. Except in cities having a city board of education, to prescribe and enforce in the public schools a course of study and the use of a uniform series of textbooks."

We see from the above sections that the Board of Education and not the Superintendent of Schools is given power under the general school law to adopt the books and apparatus for the schools of the city. Further, the Charter, Article VII, Chapter IV, Section 5, Subdivision 5, gives to the Superintendent of Schools merely an advisory power in the matter of the adoption of books and apparatus by providing that he has power "to recommend to the Board (of Education) the courses of studies, the text books and books for supplementary use in the public schools and the purchase of such apparatus, books, stationery and other classroom supplies as may be required in the schools."

We see expressed in this Section 1712 a distinction between a "board of school trustees" and the "city board of education in any city". It is provided that no warrant shall be drawn by the Superintendent of Schools **upon the order of any board of trustees** against the library fund of any district, unless such order is accompanied by an itemized bill, etc." Then it is provided that "all orders of the trustees and of boards of education for books or apparatus must in every case be submitted to the Superintendent of Schools of the county, or city, or city and county, respectively, for his approval, before said books or apparatus shall be purchased."

This refers, of course, only to an approval as to the price paid and not to the list of books enumerated, for, as we see above, the Board of Education is authorized to adopt the list

of books. If the Superintendent could veto this act of adopting a list of books, he could thus substitute his discretion for that of the Board of Education.

In my opinion, the provision of Section 1712 requiring the submission to the Superintendent of Schools of orders for books or apparatus is based upon the theory that the Superintendent must draw his warrant on the school fund for these supplies. But this procedure is changed in San Francisco by Subdivision 10 of Section 1 of Chapter III of Article VII of the Charter, providing that "all demands payable out of the Common School Fund shall be filed with the Secretary of the Board of Education, **and after they have been approved by the Board, they shall be signed by the President of the Board and the Superintendent** and sent to the Auditor." The President of the Board and the Superintendent of Schools have no discretion in the signing of these demands. Their action is merely ministerial. (See *Los Angeles vs. Leland*, 157 Cal., 30.)

Section 2 of this same Chapter and Article of the Charter provides that the Board of Education shall annually invite proposals for furnishing the annual supplies to the school department, awarding contracts to the lowest bidders. This expenditure of public money is a municipal affair and the Charter would control the state law, if in conflict therewith.

In answer to your second inquiry I advise you, therefore, that the Board of Education is not required to submit to the Superintendent of Schools, for his approval, the lists of books or apparatus proposed to be purchased by said Board, before said Board may purchase them. The Superintendent of Schools, like the President of the Board of Education, has merely a ministerial duty to perform in approving of these demands against the Common School Fund, and, in the event of the refusal of either of those officials to so approve, they could be compelled by law to do so.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Education.

What Kind of Money is Legal Tender for Taxes.

March 13th, 1912.

Sir: I am in receipt of your communication of March 9th, 1912, asking me to inform you "as to what of the various kinds of money in circulation in the United States is legal tender for taxes?"

Opinion.

Section 3888 of the Political Code is as follows:

"Taxes must be paid in the **lawful money** of the United States. A tax levied for special purposes may be paid into such fund as may be directed."

The term "**lawful money of the United States**", in my opinion, means all money **coined by** the United States, or issued by the United States and declared by Congress to be legal tender at par in payment of public and private debts. The foregoing definition therefore includes gold and silver coins of the United States and United States currency such as United States Notes and United States Treasury Notes.

While National Bank Notes circulate and pass as money, are generally acceptable in trade at par, and are receivable by the United States at par in payment of debts due the United States except custom dues they are not **money of the United States** but only promisory notes of the national banks their payment being secured by deposits with the United States Government. Therefore they are not "money" which the Tax Collector can accept in payment of taxes.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Supervisors May Adopt an Ordinance Closing Malloy Street.

March 13th, 1912.

Gentlemen: I am in receipt of your communication of the 2nd inst., as follows:

"I am directed by the Streets and Sewers Committee of the Board of Supervisors, to request you to advise said Board whether or not Malloy Street between the westerly line of Dolores Street and the easterly boundary line of the lands of the right of way of the Southern Pacific Railroad Company can be expunged and effaced from the official map of the City and County by an order of the Board of Supervisors.

As this street serves no useful purpose the Committee favors the closing of the same."

Opinion.

Section 1, Chapter III, Article VI of the Charter provides:

"Whenever the public interest or convenience may require, the Supervisors shall have full power and authority to order the opening, extending, widening, straightening or closing up, in whole or in part of any street, avenue, lane, alley, court or place within the city and county and to condemn and acquire any and all land and property necessary and convenient for that purpose."

Acting under the preceding provision of the Charter, the Board of Supervisors may adopt an ordinance closing Malloy Street in Block 30 of the Fairmont Tract as the same now appears on the official map of this City and County. In furtherance of that power it may also, in the ordinance closing the street, call the attention of the City Engineer and the Assessor to said ordinance and direct them to make their maps conform to the provisions of the ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Board of Supervisors by Passing an Ordinance Licensing
Dogs has not Parted with all Its Police Power and May
Impose Additional Restrictions Upon these Animals.**

March 16th, 1912.

Sir: I am in receipt of your communication of March 15th, 1912, as follows:

"I would appreciate a prompt opinion from you, as to whether an ordinance passed by the Board of Supervisors, directing the Public Pound to impound all dogs running on the streets of San Francisco, whether they be licensed or unlicensed, would be legal? Please note that there are some licensed dogs running at large, the licenses of which do not expire until July first next.

If such were legal, could the ordinance be worded so that the owners of the licensed dogs impounded, might secure the release of these dogs by calling for them at the Public Pound? And could the ordinance be so worded, further, that when such dogs shall have been returned to their owner, after the first impounding, and shall thereafter be caught again on the public streets, that they can only be released upon the payment of a stated fine?"

Opinion.

We now have in San Francisco an Ordinance No. 755, imposing a license on dogs, as follows:

"Section 1. Every person owning or having control of any dog shall pay a license of two (2) dollars per annum.

Section 2. Whenever a dog tag, issued for the current year by the Tax Collector, has been taken or stolen by parties unknown to the owner, or person having control of the dog for which the same was issued, such owner or person having control of such dog may, on the payment of fifty (50) cents and on making and subscribing to an affidavit of such loss of such tag, receive from the Tax Collector a duplicate tag for the remaining portion of the then current year.

Section 3. This Ordinance shall take effect and be in force immediately."

And also Ordinance No. 1364, concerning dogs running at large, as follows:

"Section 1. No person owning or having control of any dog shall suffer or permit the same to run at large in any public street; unless,

A license tax for the current year be first paid; and unless,

Such dog has around its neck a collar, and having attached thereto, a metallic plate, issued by the Collector of Licenses, having thereon the number of the license issued for said dog, and figures indicating the year for which the license tax has been paid.

Every dog found running at large in violation of this section shall be impounded.

If, on the trial of any person for violating this section, it appears to the court that any unregistered dog, while running or being at large in any street, lane or alley of this city and county, did bite any person, the court may order such a dog destroyed, and the Chief of Police shall execute such order."

We see from the above, that at present, the payment of the dog license at Two Dollars per year secures to the owners of dogs the right to have said dogs run at large. I assume that your inquiry is prompted by the recent discussion of the disease of rabies among dogs in this City. In my opinion, if the Board of Supervisors, as a result of its investigation of this subject, determines that such an ordinance as you propose should be adopted, there is no question but what the ordinance would be a valid exercise of the police powers of that Board. I believe that the license ordinance might remain as it is, but the other ordinance permitting licensed dogs to run at large would, of course, be in effect repealed by the ordinance you suggest. I do not believe that the fact that certain licenses have already been paid for the current year makes any difference, as, of course, if a sudden emer-

gency arises necessitating the impounding of all dogs found at large, the Supervisors cannot be prohibited from meeting the requirements of that situation simply because a dog owner may have availed himself of a privilege given him in an earlier ordinance to have his dog run at large. That would amount to the Board of Supervisors having in its earlier ordinance, parted with a portion of its police powers: this the Board could not have done even if it wanted to. And I believe that the feature you explain of imposing a fine on the owners of dogs which are found at large more than once, is but making effective the apparent purpose of the ordinance and so, would be valid.

In *State vs. City of Topeka*, 12 Pac. at 315, the Supreme Court of Kansas says:

“Under the almost unbroken current of authority, we think that statutes and ordinances may be passed regulating restricting, or even prohibiting the running at large of dogs in cities, and this, although dogs are unquestionably property.”

In *City of Iola vs. Sugg*, 56 Pac. 541, the Court of Appeals of Kansas held that it was lawful to require the owner of any dog to pay a license, although the dog so taxed or licensed may never have been permitted to run at large.

In *Van Horn vs. People*, 41 A. R. 159, at p. 160, the Court said:

“ * * * On account * * * of their liability to break through all discipline and act according to their original savage nature, and because also of their liability to madness, it has been customary always to make dogs the subject of special and peculiar regulations.”

In *Ex Parte Cooper* 30 A. R., 152, the Court of Appeals of Texas had before it for consideration an act which recited that:

“Whereas, there are in many localities in this state a very large number of dogs, and there are strong indications of a

prevalence of hydrophobia, from which danger will result to the lives and property of citizens;" therefore, following which it was enacted that the keeping of dogs shall be a privilege which shall be taxed, every owner or harbinger of a dog being required to pay \$1.00 on each dog.

Discussing the objection raised that dogs are "property" in the sense that they are liable to, and can and should, be taxed ad valorem, as other property, the court said, at page 156—

"* * * in law, dogs are not recognized as other property and subject to an ad valorem taxation."

The Court further says at page 155:

"But dogs and cats, even in a state of domestication, never wholly lose their wild natures and distinctive instincts, and are kept either for uses which depend on retaining or calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner."

And further,

"And dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals."

At page 156 the court says, quoting Gray, J. in *Blair vs. Forehand*, 100 Mass. 139.

"All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others, and the security of the public health and welfare."

And the court further quotes from the case of *Tenny vs. Lenz*, 16 Wis., 566, as follows:

"Dogs, though possessing many excellent qualities, are liable, by running mad and destroying sheep, to do great mischief. Hence it is strictly a legitimate exercise of the

police power 'to regulate the license and keeping of dogs', as was done by the act referred to. * * *. The exercise of that power is based upon the idea that the business licensed, or kind of property regulated, is liable to work mischief and therefore needs restraints which shall operate as a protection to the public. For this purpose the license money is required to be paid."

In the case of *In Re Ackerman*, 6 Cal. App., 5. the Court considered an ordinance licensing and regulating the ownership of dogs, and the following language of the Court found on pages 11, 12 and 13 is interesting as showing the point of view of the Appellate Court of California on this general subject.

"It is not only not ambiguous and uncertain in its terms, but its language is clear and unmistakable and easy of comprehension. Nor are its provisions and terms characterized by unreasonableness. On the contrary, the ordinance appears to represent only a wholesome and salutary exercise of the power of police. The purpose sought to be attained by the ordinance is not only commendable in the highest degree, but is of paramount importance to all communities possessing a considerable number of inhabitants. Common experience justifies strenuous opposition to (and wisely sanctions the curbing of) unbridled and, it may be added without facetiousness unmuzzled liberty in the canine species, particularly in urban communities. Much has been written and spoken of the dog and its many noble qualities. It may truthfully be admitted that innumerable instances of the unflinching loyalty and faithfulness of that quadruped to his master or to a friend to whom he has become attached are recorded, and have justly inspired writers of intense and ardent natures and of vivid and lively imaginations to soar to supernal heights of eloquence and of poetic fancy in their descriptive song of the noble attributes of the dog. There can be nothing further from the purpose or disposition of the writer of his opinion to detract from or underestimate the work of a good, conscientious law-respecting dog—a canine

content to remain at all times within the limits of his own bailiwick and there regale himself in an atmosphere of perfect ease and comfort, with frequent delightful excursions to the land of Hypnos, and at the same time ever alert to the highest interests of his master, and, generally speaking, scrupulously faithful to all the pacific and innocent pursuits which have come within the curriculum of his education. There can be no doubt that many dogs, for their acts of heroism in saving human life or preventing injury to their masters when surrounded by appalling circumstances of danger, deserve a conspicuous place in poetry and song; but there is no inconsistency between this observation and the suggestion that when the poet, as, under the entrancing spell of ethereal dreams, in winged boat, he flits 'from mount to mount through Cloudland,' permits fancy to get the upper hand of fact and thus unconsciously wanders from concrete cases to abstractions in his perfervid panegyrics upon the canine, he slips far over and beyond even the boundary line established and tolerated by poetic license. It is, we think, safe to say that those writers who have written such glowing tributes to the dog in the abstract have never had any actual experience with a monstrous canine of the bull family, to which they were strangers. There is neither poetry nor sentiment in the dog, as a rule, especially when one meets him upon what he conceives to be his own preserves, for such an occasion is generally conceded to be an appropriate time to cast song and sentiment to the winds and to get busy by moving with all possible haste a comfortable distance beyond the danger line. But it must be admitted that there are really some good-tempered, well-behaved dogs, which are, it may be granted, quite useful in their way. But the other kind become good dogs only when they have ceased to be able to exercise the power of respiration.

At the common law, the dog was classed in the category of animals *ferae naturae*, and many of them should be so classed now. We are safe in going further and declaring that the very best of them can, with less effort and in a

shorter space of time, make themselves more of a nuisance to the square inch than any other domestic quadruped of which we have any knowledge. Even those having the good fortune to have received the fullest measure of civilized care, nursing, petting and general disciplinary domestication, from puphood to the danger point of maturity, have not had the instincts of savagery inherited from their distinguished ancestral relative and implacable enemy of the human race, the wolf, so mollified as to render them altogether disposed to maintain uniformly peaceful relations with the human family. For it may be accurately declared that nearly all dogs are friendly only with their masters and immediate family, and that strangers, however honest and peaceful their intentions may be, are almost invariably treated by them as intruders, having no rights that a dog is compelled to respect. In these observations, though rather dog-matically asserted, we think no one of ordinary experience in the common all-around affairs of this mundane sphere will hesitate to con-cur. If the killing by the marshal of a dog without formally notifying the owner of the time and place of the proposed execution, is violative of the injunctions of our constitutions against the taking of property without due process of law, how much more flagrantly is that sacred fundamental principle outraged in the vicious act of an ill-tempered, snapping dog, which, without previous warning or other due notice and without provocation, wantonly deprives a human individual, who has never trespassed upon or otherwise invaded his rights, of a quantity of his *avoids*! This suggestion is offered only in illustration of one of easily a hundred available reasons which could be advanced in support of a local legislative measure whose object is to regulate the ownership and consequently, as far as it can be done, the behavior of dogs. * * *

Many other reasons than those already suggested could be given why the ordinance here is not only reasonable but an important regulation. The dog is subject to hydrophobic fits, and the laceration of the flesh of a human by a dog thus

afflicted will almost invariably inoculate such person with the poison of the malady, usually with a fatal result."

I would suggest, if such an ordinance as you indicate be passed, that the Supervisors indicate in its wording, the occasion for its adoption, and also, that it be by its terms limited to some specific period, as that would render it a more reasonable exercise of the Board's police power. And if, at the end of that period it were found necessary to continue the rule, it could of course, be reenacted.

Respectfully,

PERCY V. LONG.

City Attorney.

The Mayor.

**Board of Supervisors May Impose an Ordinance Requiring
all Dogs Licensed or Unlicensed to be Muzzled When on
the Public Streets.**

March 21st, 1912.

Gentlemen: I am in receipt of your communication of February 21st, as follows:

"I am directed by the Committee on Public Health to forward to you the inclosed copy of a proposed Ordinance, prepared by the Board of Health relative to the muzzling and control of dogs on the public street. Same is referred to you for an opinion as to whether it conflicts with any existing Ordinance."

Opinion.

The existing ordinance concerning dogs running at large is Ordinance No. 1364, approved December 15th, 1904, which provides, generally, that no person owning or having control of any dog shall permit the same to run at large unless the license for the current year is paid and that such dog shall have around its neck a collar with a metal tag issued by the Tax Collector attached thereto.

The proposed ordinance requires that all dogs, whether licensed or not, shall be muzzled. The only possible conflict between the present and proposed ordinance is that, inasmuch as dogs licensed and wearing tags are now allowed to run at large, the proposed ordinance prohibits such licensed dogs from running at large unless they wear the muzzle as therein provided.

The power of the Board of Supervisors to legislate on this subject has not been exhausted by the adoption of Ordinance No. 1364. Under the police power granted to the Board of Supervisors by Sub. 1, Sec. 1, Chap. II, Art. II, the Board may ordain, make and enforce within the limits of the City and County all necessary police laws and regulations. If, in the judgment of the Board, the proposed ordinance is a necessary police law it may, under its police power, adopt this or any other ordinance designed to carry into effect the same purpose.

No rights of any person or persons, will be invaded if the proposed ordinance becomes a law. Before any dog is allowed to run at large, after the passage of such proposed ordinance, the owner of such dog would be compelled to attach to it, the license tag as provided in Ordinance No. 1364, and the muzzle called for by the new ordinance.

Similar ordinances have been upheld as being a proper exercise of the police power resting in municipalities, and in my opinion there would exist no conflict between the present and proposed ordinance, and you are advised accordingly.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Board of Supervisors has Power to Acquire Certain Land for
Board of Health and to Sell Other Land.**

March 21st, 1912.

Gentlemen: I have your communication wherein you ask to be advised whether the petition of the Board of Health to dispose of certain lands in the Relief Home Tract and purchase other lands near by should be granted, and whether your Board has power to carry out such transaction.

Subdivision 12, Section 1, Chapter II, Article II of the Charter authorizes your Board to purchase such property as may be needed for public use. Section 9 of the same Chapter authorizes your Board to sell all lands owned by the City and County between Ninth and Eighteenth Streets and any lands purchased by the City and County after November 23rd, 1907.

Under the provisions of the Charter, therefore, your Board is authorized to provide for the purchase of the land desired but unless the lands proposed to be sold were purchased by the City subsequent to November 23rd, 1907, there is no power in your Board to cause their sale.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Persons Tried and Dismissed by Civil Service Commission
From Department of Electricity not Entitled to Rein-
statement.**

March 21st, 1912.

Sir: I have your communication asking to be advised as to the power of your Department to reinstate J. J. Hyer and J. J. Carroll, both of whom were tried before the Civil Service Commission and dismissed from the Department.

The Charter does not authorize your Board to make any reinstatements and as long as the judgment of dismissal

stands the parties named are not entitled to reinstatement. Their remedy consists in a judicial proceeding to review and annul the judgment of dismissal entered by the Civil Service Commission.

Respectfully,

PERCY V. LONG,
City Attorney.

Chief of the Department of Electricity.

Status of Expert Doing Work for City—Not Necessarily an Employee Within the Charter Provision Requiring Residence.

March 21st, 1912.

Sir: I have your communication of March 15th regarding the protest to the payment of the salary of William Dolge on the ground that he is not a resident of the City and County. You state that it is the contention of Mr. Dolge that he is not an employee of the City and County but that he is merely engaged as an expert to do special work.

Sections 3 and 4 of Chapter II of Article II of the Charter provide that the Finance Committee shall examine the transactions and accounts of all officers having the collection, custody or disbursement of public money and shall investigate the sufficiency of the sureties of all bonds of all city and county officers and examine the records and books of account of all persons, companies or corporations that are required to pay a portion of their gross receipts into the treasury.

Section 4 of Chapter I of Article II of the Charter authorizes the Board of Supervisors to "appoint a clerk, sergeant-at-arms and, when authorized to do so by ordinance, such additional clerks and other assistants as may be deemed necessary."

Section 2 of Article XVI of the Charter provides that

"All deputies, clerks, assistants and other employees of the city and county must be citizens of the United States and must, during their respective terms of office or employment, actually reside in the city and county, and must have so resided for one year next preceding their appointment."

Unless the duties performed by Mr. Dolge are such as take him out of the class of an employee it must be evident that under the provisions of the Charter above quoted, he is an employee of the city and county, to be appointed by the Board in the manner provided in Section 4 of Chapter I of Article II and that he is subject to all the restrictions named in Section 2 of Article XVI.

On the other hand, if the duties are such as would take him out of the class of an employee and make him a contractor with the city so that he agrees to furnish a particular result, free to dispose of his own time and personal efforts according to his pleasure without responsibility to the Board, and if the nature of his duties are such that he engages and agrees with the Board to produce a certain result in a single transaction, executing his work entirely in accordance with his own ideas and without being subject to the orders of the Board, then his employment is not subject to the provisions of the Charter above quoted.

Where, however, a person is employed regularly and paid either a salary or wages for the time employed and performs services under the direction and orders of a Superior, he is an employee and not a contractor.

If the duties performed by Mr. Dolge correspond to the rule last above stated then it is evident that if the facts stated in the protest are true his employment by the City is irregular. On the other hand, if the duties are not of such a nature or if the facts stated in the protest are not true, then he comes within the rule of the opinion of February 10th, 1912, addressed to the Mayor, of which you have a copy.

Respectfully,

PERCY V. LONG,
City Attorney

Auditor.

**One Who is Retired Upon a Pension Cannot be Employed as
Expert by the City.**

March 21st, 1912.

Gentlemen: I have your request of March 13th, which reads as follows:

“This Board is desirous of engaging the services of an expert for several weeks for the purpose of reporting the cost of substituting motor driven apparatus for the horse driven apparatus. This is work of a special character which requires the services of an expert on such matters and the Board has in view the selection of a man who was formerly an active member of the department, but who has been retired upon pension, a doubt has arisen in the mind of a member of this Board as to the propriety of paying this expert for his service in view of the fact of he being in receipt of a pension from the municipality, as above stated.

We therefore respectfully request that you advise this Board if it can legally compensate this pensioner for any services he may render this department as such expert.”

You are advised that though the charter does not prohibit the employment of one who has been retired upon a pension to perform services such as those designated in your communication, the theory upon which he is pensioned is that either by injury or age he is unable to longer render service to the city as a member of the Department. On account of such disability he is retired upon a pension which is in the nature of a reward for services which he has previously performed. If he is able to perform duties as a member of the Department, then it is the duty of the Commission to restore him to active services.

I am therefore of the opinion that though the charter does not specifically prohibit such employment, it was not intended to authorize it.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Sub-Sidewalk Areas are Subject to the Jurisdiction and Control of the City.

March 28th, 1912.

Gentlemen: I herewith submit my opinion requested by Resolution No. as follows:

"1. As to whether sub-sidewalk areas belong to the City and are under its control; whether the City can compel in future all pipes and conduits to be laid therein.

2. As to the ownership of land occupied by streets that have been closed, and whether the City can collect rent therefor from persons in possession."

Opinion.

AS TO WHETHER SUB-SIDEWALK AREAS BELONG TO THE CITY AND COUNTY.

Section 1 of Chapter II of Article III of the Charter of the City and County is as follows:

"Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power: * * *

2. Except as otherwise provided in this Charter in the Constitution of the State of California, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County."

Section 9 of Chapter I of Article VI of the Charter grants to the Board of Public Works the charge, superintendence and control, under such ordinances as may from time to time be adopted by the Board of Supervisors of all public ways, streets, avenues, lanes, alleys, places, courts, roads, highways and boulevards now opened or which may hereafter be opened in the City and County of San Francisco, of the manner of their use and of all work done upon, over or under the

same; and herein particularly the Board shall have exclusive authority to prescribe rules and grant permits in conformity with the ordinances of the Supervisors for the moving of buildings through the streets thereof or the placing of **cellars** or vaults under the streets or **sidewalks**.

Exercising the power granted to it by the Charter, the Board of Supervisors adopted Ordinance No. 1008 (New Series), approved December 22nd, 1909, Section 13 thereof reading as follows:

“Permits shall be granted by the Board of Public Works for the use of the space below the sidewalk upon application, which permits must be made upon blanks and subject to such regulation as the Board of Public Works may devise.

No fee will be exacted for the permit for the use of the sub-sidewalk space, but the Board of Supervisors of the City and County reserves the right to suspend or annul the privilege of maintaining such cellar or vault, or to exact a license or rental for the use thereof, or to apply such sub-sidewalk space, or any portion thereof, to municipal uses.

The granting of a permit to use the sub-sidewalk space shall carry with it the right to excavate the space and to build the necessary retaining walls.

As a guarantee for the proper restoration of any portion of the roadway fronting the same which may be disturbed or injured by reason of the construction of any part of a building or structure, the permittee shall deposit with the Board of Public Works for each and every front foot or fraction thereof of the premises in front of which the excavation for such cellar or vault is to be made, the sum of \$2.50 when the street in front thereof is paved with blocks or asphalt or bitumen on concrete, and \$1.50 when such street is paved with basalt blocks or cobblestones on a sand foundation. Said deposit shall be refunded to the permittee upon the indorsement on the permit issued therefor of a certificate of the Bureau of Streets certifying to the satisfactory condition of such roadway.

Should the permittee fail to restore any pavement thus injured the Board of Public Works may, after ten days' notice in writing posted at the building, restore the pavement and pay the cost of such restoration from the deposits."

The foregoing provisions of the Charter and Ordinance 1008 (New Series) confer upon the Supervisors and Board of Public Works full and complete power, authority and jurisdiction over all streets in this City and County.

The term "street" has been defined by our Supreme Court on many occasions, and I refer to *Ex Parte Taylor*, 87 Cal., p. 84, as an illustrating case, in which the Court used this language:

"Municipal charters in this State universally confer upon local municipal governments power to legislate for the maintenance and care of their public streets. It is conceded here, and this Court has held, that streets include sidewalks as well as the roadway (*Bonnett vs. San Francisco*, 65 Cal. 230), and that the obstruction of a sidewalk is a public nuisance (*Marini vs. Graham*, 67 Cal., 130)."

The jurisdiction, therefore, of the municipality over streets, embraces not merely the roadway used by vehicles, etc., but extends over the sidewalks on both sides of the roadway; in other words, from property line to property line.

It is not necessary to further expatiate on this branch of the inquiry, but I would suggest that the Board, in order to carry out the purpose expressed in the Resolution of compelling all pipes and conduits to be laid under the sidewalks, proceed to suspend and annul the privilege of maintaining the cellars or vaults now existing under sidewalks and streets granted by the Board of Public Works under Section 13 of Ordinance No. 1008 (New Series) and repeal said section. Then the way would be cleared to permit the City and County to take such action as may be found it possesses the power to take, to utilize such areas for pipes and conduits.

Right of the City to Compel in Future All Pipes and Conduits to be Laid Under the Sidewalks.

I have shown that the municipality has jurisdiction and control over the full width of all streets in the City and County. The only question to be discussed is whether or not abutting property owners have any rights in the streets which the authorities are bound, under the Constitution, to respect. The Constitution, Section 14, Article I, provides:

“Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.”

Would the use, by the municipality, of such sidewalk areas, be a taking or damaging of private property without compensation? This question has been exhaustively treated and answered in the negative by Judge Dillon in his work on *Municipal Corporations*, 5th Edition, Vol. III, par. 1178, et seq. as follows:

“In many cities lot proprietors upon streets are permitted or not forbidden to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar. It is also the usage that owners of buildings may make openings **under** the sidewalk or street to obtain additional cellar room. If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot-owner has, it seems clear, no absolute right, as against the public or the municipality charged with the control of the streets, to appropriate them to this use. And in our judgment the lot-

owner's right is not substantially greater even if he has the fee in the street. In either case, to recognize such a right except to municipal regulation would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate street uses and servitudes required, or which may be required, for the public benefit and convenience. The lot-owner's rights are subject to the paramount rights of the public; and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunnelling, public cisterns, gas-pipes, water pipes, and other improvements, might be seriously affected by the recognition of a right in the abutter to make at pleasure openings in, or even under, the sidewalk or street, except subject to reasonable municipal regulation. It is clear that all rights of this character are subject to legislative and municipal regulation.

1179. Speaking of this subject, the Supreme Court of Illinois remarks: 'We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal-cellar under it; but as such a privilege is a great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars may be implied, in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work. * * * 'But,' the court adds, 'while we infer a license thus to use a part of a public street, it is on the condition that the person doing so shall use more than ordinary care and expedition in the prosecution of the work. Neither the public nor other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible.'

1180. The right of an abutter to construct vaults under the sidewalks, or to make openings therein for cellar-ways, or to enclose areas, within the line of the street, is not an incident of ownership, however, convenient or even necessary the exercise of such an authority may be to the full enjoyment thereof. The implication of such a right as one annexed to the land and arising out of the ownership merely would lead to embarrassing complications and interfere with the control and regulation of streets which in the interests of the public is reposed in the public authorities. It is, however, competent for the legislature to authorize a limited use of the sidewalks in front of buildings in cities and villages for areaways, cellar openings, or underground vaults, for the more convenient and beneficial enjoyment of the adjacent premises. The use of the sidewalk for these purposes restricts somewhat the free and unembarrassed use of the sidewalk for pedestrians, but it is justified on the ground that the general interests are served, by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to improvement, and adding to taxable values. The legislative power to permit the use of the streets and sidewalks for these purposes may be delegated to the municipal authorities. A vault constructed under a permit from the municipality is in itself a species of property; it is regarded in New York as in the nature of an easement appurtenant to the abutting property and the owner of the abutting property may protect it as against all trespassers as fully as any other property. The rights, we think, of such an abutter in vaults constructed under municipal authority are strictly speaking not easements in a legal sense, but are rights or privileges based on a revocable consent or license. The owner of the abutting property may, it is justly held, recover damages from one negligently injuring the sidewalk or roof of the vault, rendering its repair or rebuilding necessary. The giving of consent to the maintenance of a vault beneath a sidewalk is said to be an executive act, which, from its nature, does not require an ordinance or

resolution, as in the case of a legislative act, or a written decision, as in the case of a judicial act. It may be given orally. Permission to construct a vault may be inferred from acquiescence in its maintenance for many years. The presumption of the assent of the public authorities applies not only as between the owner of the property and a third person, but also as against the city, if there is no proof to overthrow it. But this presumption is not that the owner or his grantors acquired any right to the use of the street by prescription, or without the consent of the proper authorities, but that from such use it may be presumed that the proper consent was given. It is a presumption only, and may be displaced by proof; it is not a presumption of a grant of the title, or of a permanent right in the street, as no power exists in the authorities to make such a grant or to confer any such right. Hence, where an office is provided for by statute and ordinance, in which records of all applications and permits for vaults are filed and indexed, and diligent examination of such records shows that no permit for building a vault in front of a lot has been granted, the presumption of municipal consent arising from the maintenance of the vault for twenty-one years is overcome. But although an areaway, cellar opening, or vault within the limits of a street is not a trespass if made with the municipal assent, express or implied, or a nuisance per se, it may be a nuisance if the municipal authorities fail to take steps to see that it is properly guarded and due provision made for the safety of the public. And the person who receives a permit for the construction of such an opening impliedly agrees to perform the act permitted with due care for the safety of the public and is liable for any violation of duty in this regard. Whenever the existence of the vault or opening interferes with the public use of the street, the right to maintain it terminates; the right of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public. The permit may be revoked when the space is required for municipal or other public purposes."

We are not without authority in this State on the question. In the case of *Calegrove W. Co. vs. Hollywood*, 151 Cal., at page 429, the Supreme Court used this language:

"One who grants to the public the right to use a strip of land as a highway, retaining in himself the ownership of the soil, parts with an easement merely. The owner of property subject to an easement may use his property in any manner and for any purpose not inconsistent with the full and free enjoyment of the easement. (*Hoyt vs. Hart*, 149 Cal. 722, 87 Pac., 569). This rule applies to land devoted to use as a public road or street as well as to land subject to a private use only. The right of the abutting owner is, of course, always subordinate to the rights of the public. In city streets the easement of the public is, as a result of the conditions of urban life, more extensive than in roads through sparsely inhabited regions. In cities, it is customary to devote not only the surface of the street and the space above the street to public use, but the municipality may, and frequently does, occupy the soil beneath the surface for the accommodation of sewers, gas and water pipes, electric wires, and conduits for railroads. Where the city undertakes to occupy the space above or below the surface of the street for any purpose within the scope of the public uses to which highways may be put, the use by the owner of the fee must yield to the public use."

The authorities agree that the abutting land owner has no property rights in the street which must be compensated for when the City desires to lay down pipes or conduits. In my opinion the power and authority of the Board of Supervisors to order the use of the sub-sidewalk areas for the purpose of installing pipes and conduits is absolute.

As to the Ownership of the Land in Streets Closed by the Board of Supervisors Under the State Law or the Charter.

Before the adoption of the Charter, the power to close streets was conferred by the Act of the Legislature of March

6th, 1889 (Statutes 1889, p. 70.) The provisions contained in Chapter III of Article VI of the Charter are almost identical in form with the provisions of the Act of 1889; in fact, the same were patterned after the State Law.

Section 1 of Chapter III of Article VI provides that:

“Whenever the public interest or convenience may require, the Supervisors shall have full power and authority to order the opening, extending, widening, straightening or clearing up, in whole or in part, of any street, avenue, lane, alley, court or place within the city and county and to condemn and acquire any and all land and property necessary and convenient for that purpose.”

There is another section of the Charter, Section 27, Chapter II, Article VI, which confers power on the Board of Public Works to close up any street less than forty feet in width upon the petition of all the property owners thereon. In an opinion rendered by me on May 27th, 1909, page 365 of the published opinions of the City Attorney, 1908-9, I held that the Board of Supervisors exclusively possessed the power to close up the streets in this city, using the following language:

“It seems to me that two different methods are provided in the Charter by which streets less than 40 feet in width can be closed. One is provided under Section 27, Chapter II, Article VI, and the other is under Section 1 of Chapter III, of the same Article. I cannot see that there is any repugnancy between the two Sections. I feel that the well established rule of statutory construction that Statutes upon the same subject matter must be construed together applies. In any event if the application of this rule could not be invoked, I should have to hold that Section 27, Chapter II, of Article VI, was by the adoption of the Charter amendment to Section 1, Chapter II, of Article III, repealed to the extent of the repugnancy.”

I cite the provisions of the law applicable to the closing of streets merely for the purpose of acquainting the Board with its power in relation thereto.

It may be taken as an exact expression of the law, that if the City and County of San Francisco, or its predecessor, the City of San Francisco, possessed the title to the fee in the lands embraced in the closed street, the act of the municipality in closing such streets worked no change in the title. The contrary proposition is also true; that where the title to the fee in such street was in private owners and the land was dedicated for the purposes of a street, the owner reserving the fee, the act of closing such street, operated as a relinquishment by the City and County of the public easement and the owner of the soil is restored to his original dominion over the same.

But in this connection we must not overlook another proposition, which is: that whenever the City and County closes up and abandons a street, the title to the fee thereof being in the City, the land embraced therein immediately becomes liable, upon the lapse of the statutory period, five years, to be claimed under a title by adverse possession.

Land once dedicated to public use as a street, can never be claimed by any one in opposition to the City and County, by adverse possession. This doctrine has been upheld without interruption by a long line of decisions of the Courts of this State. It is different, however, when land has been, by legal action of the governing body of the municipality, abandoned as a street, thus depriving it of its character as a street, and placing it in the class of property owned by the municipality in its proprietary capacity.

The rule of law in regard to title by adverse possession applies with equal force to municipal corporations and to persons. Therefore, land owned by the City and County in its proprietary capacity merely, stands upon the same footing as land owned by an individual.

From what has been said, it will be seen that there are two great classes of streets in this City: 1st. Those which have been set apart on land owned in fee by the City and County or have been granted in fee by the former owners, and 2nd, those which have been dedicated by the owners of the soil,

who by the instrument of dedication, whether by deed, or more generally, by the filing of a map upon which streets are delineated, reserve unto themselves the title to the fee thereto.

In the first class, when streets are closed, the title remains in the City and County; in the second, the title to the land reverts to the owner of the soil; yet it is said that the land does not revert, because there has been no alienation, the public possessing a certain specified right, the enjoyment of which is inconsistent with the exercise of private rights and whenever the public rights are abandoned, the private rights are thereby revived.

The Supreme Court, in the case of *San Francisco vs. Center*, 133 Cal., page 673, said, on page 680:

“Appellants next contend that the adoption and publication, by the city of the engineer’s map, and subsequently of the Humphrey map, as the official maps of the city, upon which the location and direction of the streets adjacent to Mission Creek were greatly altered, was an abandonment of all those streets and parts of streets marked on the Van Ness map which were not included in the latest official maps. This proposition seems to be fully sustained by the decisions of this court in *Brook vs. Horton*, 68 Cal., 554, and *San Francisco vs. Burr*, 108 Cal., 460. And *Brook vs. Horton*, 68 Cal., 554, also seems to hold that a valid title by prescription may be founded upon an adverse possession of a part of a street thus abandoned. But it does not follow that the city, in the absence of an adverse possession sufficient to give a prescriptive right, would lose the title to the land, or that it would pass to the owners of the adjoining premises, unless they had been owners of the fee subject to the public right of way. Here, the defendants never had any title to any part of Channel Street, as marked on the Van Ness map. The fee was in the city from the date of its organization, and the abandonment of the street worked no change in the title.”

I have here enunciated the rules of law applicable to the subject of the title to the land in the closed streets. In order to answer the inquiry as to whether the City can collect rent from persons in possession thereof it will be necessary to determine the origin of the title to every one of the streets closed by the Board of Supervisors. In the book entitled "Public Streets of San Francisco," published by the Board of Supervisors on January 1st, 1910, there is a list of one hundred and thirty-three streets which have been so closed, and since the date of said publication, others have been closed. The time required to search the title thereto will be necessarily long, and in a matter of this importance, great care must be exercised to the end that every right of the City will be protected and asserted, and at the same time invading none of the rights of the individuals.

You are advised:

1st. That the City and County of San Francisco possesses the power to revoke all permits to occupy sub-sidewalk areas;

2nd. That having revoked the said permits, the subside-walk areas become, immediately thereafter, subject to the jurisdiction and control of the municipality;

3rd. That the right of the City and County to utilize said areas for the purpose of laying pipes and conduits therein is absolute;

4th. That the ownership of the land embraced in the closed streets depends on the determination of the origin of the title thereto and involves also questions of fact, which I do not possess the power to decide, as to whether or not there has arisen title by prescription adverse to the City and County in respect to those streets, in the soil of which the municipality owned the fee.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**"Superintendent of Engines" Cannot be Certified From the
Eligible List of "Machinists."**

March 28th, 1912.

Gentlemen: I am in receipt of your communication of the 13th inst., in which you ask for an opinion on the following facts:

"On December 9th, 1910, the Fire Commission made requisition upon this Commission for the certification of an eligible for appointment to the position of Superintendent of Engines, stating that the person to be certified should be a first-class machinist and have a general knowledge of steam fire engines.

In response to said requisition, this Commission, on December 10th, 1910, certified Wm. Gleeson who stood No. 1 on the eligible list of machinists and who was then holding the position of Superintendent of Engines under temporary appointment.

On December 15th, 1910, said Gleeson was appointed by the Fire Commission from said certification as Superintendent of Engines and thereafter held said position until on or about March 1st, 1912, when the Fire Commission declared said position to be vacant and sent to this Commission a communication of which the following is a copy:

'To the Honorable Civil Service Commission:

Gentlemen: This Board respectfully requests that you certify the name of an eligible for the position of Superintendent of Engines in this Department, and in this connection we direct your attention to the fact that heretofore the position has been filled under regular certification from the department of Civil Service by an eligible from the general machinist's list. Inasmuch as no examination has been held for the position of Superintendent of Engines, we assume the fact to be that this certification was irregular and that the proper method of procedure would have been a certifi-

cation of an eligible for appointment to the position of Superintendent of Engines.

Respectfully, yours,

BOARD OF FIRE COMMISSIONERS,

(Signed) D. R. Conniff, Secretary.'''

I understand that while Mr. Gleeson was on the eligible lists of "Machinists" in that class of our classified Civil Service known as "Division B—Mechanical Service—Class XXXVII—Machinists", at the time of his appointment, that there was then and ever since has been another classification, in the Fire Service, known as "Fire Service—Division G—Class IV—Superintendent of Engines." Gleeson never took an examination under the latter classification. In fact, although the classification was made, examinations have never been held to make up an eligible list under this classification. In my opinion, there is no question that the Civil Service Commission had no authority to certify from one class for a position in the other. They are two distinct classes, one undoubtedly being created to supply machinists throughout the different departments of the City subject to Civil Service, and the other being created in accordance with the Charter section creating the position and being intended solely for service in the Fire Department. The appointment, therefore, was void and of no effect from the beginning.

You are therefore advised that Mr. Gleeson has no legal claim to said position of Superintendent of Engines.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commissioners.

**Home Telephone Co.—Transfer of its Properties—Remedies
Open to the City.**

March 29th, 1912.

Gentlemen: I am in receipt of your communication enclosing Journal Resolution No. 114, which reads as follows:

“Whereas, in and by Ordinance No. 75 (New Series), the Home Telephone Company was granted a franchise to construct, maintain and operate a telephone system in the City and County of San Francisco, and by virtue of said grant has installed and has been maintaining and operating such system up to and until March 16th, 1912; and

Whereas, on said last named date said Home Telephone Company conveyed all of its properties so used in the operation and maintenance of said telephone system to the Pacific Telephone and Telegraph Company by mesne conveyance through the Long Distance Home Telephone Company; and

Whereas, said Home Telephone Company has filed with the Supervisors, pursuant to a condition in said franchise requiring it so to do, a bond in the penal sum of \$250,000, running to the City and County of San Francisco, to secure the due performance of each and every term and condition of its said franchise; and

Whereas, one of the terms and conditions of said franchise (condition ‘fifth’) is that the grantee thereof shall not, without the consent of the Supervisors, evidenced by ordinance, transfer its property to any person or company at the time of said grant engaged in the telephone business in the City and County; now, therefore, be it

Resolved, The City Attorney be, and he is hereby directed to advise this Board:

1. Whether the transfer hereinbefore set forth is in contravention of or a substantial violation of said condition fifth of said franchise;

2. Whether a recovery may be had by the City and County on said bond of said Home Telephone Company hereinbefore referred to;

3. Whether or not said transfer is against public policy, and may or may not be set aside and annulled by quo warranto or other proceedings.”

In answer to the first query as to whether or not the transfer hereinbefore set forth is in contravention of or a substantial violation of Condition 5 of said franchise, I would say that Condition 5 of the franchise is most peculiarly worded. It declares that the grantee of the franchise shall not sell or transfer its property **or any of the rights or privileges authorized or granted** by said franchise to any person, company, combination, trust or corporation now engaged in the telephone business in the City and County of San Francisco.

The transfer referred to in your request was a transfer from the Long Distance Home Telephone Company to the Pacific Telephone and Telegraph Company. The Pacific Telephone and Telegraph Company is a corporation that was not in existence or engaged in the telephone business in the City and County of San Francisco at the time of the grant of the franchise to the Home Telephone Company of San Francisco.

Taken literally, Condition 5 of the franchise in question does not prohibit a conveyance such as the conveyance in this case, the assignee in this case not having been engaged in business at the time of the creation of the franchise. To my mind, however, it is extremely doubtful whether a court would so narrowly interpret Condition 5 of said franchise. The apparent intent of this condition was to prevent a combination of franchises. The undoubted purpose was to prevent the franchise created by the ordinance in question from being amalgamated with the franchise or franchises held by other companies in existence at the time of the passage of the ordinance creating the franchise of the Home Telephone Company.

In the light of this apparent intent I consider it highly probable that a court would hold that Condition 5 of the Home Telephone Company's franchise is intended to prohibit and does prohibit the conveyance of the rights arising under the Home Telephone Company's franchise to companies at that time engaged in business or to their successors holding the franchises in existence at the time of the creation of the Home Telephone franchise.

This is a matter of judicial interpretation and one that should be passed upon by some court. If the court should take the narrower view, then, clearly, the transfer in this case is not in contravention of Condition 5 of the franchise. If the court should take the more liberal view, the view that I think it should take, then, clearly, said assignment is in contravention of said Condition 5.

As to your second query, whether a recovery may be had by the City and County on said bond of said Home Telephone Company I would say that naturally an answer to this question depends somewhat upon the answer given to the first question. However, there are additional considerations involved that might, even though the first question propounded to me were answered negatively, permit of a recovery upon the bond. Should the Home Telephone Company, being still the holder of the franchise to ensure the carrying out of which the bond was given, refuse to give the service to the City expressly called for in the franchise, I believe a recovery upon the bond could be had. Furthermore, it is an implied condition of all franchises that the holder of the franchise shall give service to the public. The Home Telephone Company, having transferred its property, has rendered it impossible for it, for the time being, to give service, and if it continues to so fail, particularly after demand, to give service to the public, a recovery upon the bond should be had upon said ground.

As to your third query, whether or not said transfer is against public policy and may or may not be set aside and annulled by quo warranto or other proceedings, I would say

that if this transfer was made in contravention of the terms of Condition 5 of said franchise, then I believe that it is void and the sole question remaining is one of remedy.

It is my opinion that if this transfer is void, it is absolutely void so far as the City is concerned. The City can refuse to recognize the claims of the Pacific Telephone and Telegraph Company in the conduits, pipes, poles and wires under, on or over the streets of the City and may prevent the exercise of any rights claimed by said Company therein. This should be done unless, in your opinion, based upon a consideration of the actual facts, the matter cannot or should not be brought to a court issue by the City, thus preventing the Pacific Telephone and Telegraph Company from using this property in the City streets and exercising this franchise.

Should the City, however, desire to commence legal proceedings designed to set aside the transfer or to bring out the same result, it has one of two possible remedies, either quo warranto against the Pacific Telephone and Telegraph Company, or a suit against all of the telephone companies involved, to set aside the transfer.

As to the efficacy of these remedies, that is a matter which will depend upon the facts as they may appear and as to the point of view the Court will take as to the necessity of relief under the facts presented to it.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Turk Street (Between Masonic and Parker Avenues) Was in 1897 Reduced in Width From 100 Feet to 68 Feet and 9 inches by Order No. 3080 and Title to the Abandoned Portion Vested in the Abutting Property Owner.

March 29th, 1912.

Gentlemen: I am in receipt of your communication of the 26th inst., as follows:

“Will you kindly prepare for Supervisor Koshland an opinion as to the rights of the City in the matter of the proposed closing of Turk Street between Masonic Avenue and Parker Avenue, included between the present northerly line of Turk Street and a line drawn parallel thereto at a distance southerly therefrom 31 feet 3 inches.

Briefly, the status of this matter as pending before the Board is a request from the Roman Catholic Archbishop to close that portion of the street, thereby making the street 68 feet 9 inches wide instead of 100 feet as now laid out.

I understand that the history of this subject will be found in the Municipal Reports of 1907-1908.

Supervisor Koshland wishes to be fully informed as to the right of the City to close the street, by which action the strip mentioned will revert to the Archbishop. No compensation is mentioned.”

Opinion.

Turk Street, prior to April 30th, 1897, was one hundred feet in width from the westerly line of St. Joseph's Avenue and the easterly line of Parker Avenue. On said date Order No. 3080, “Overruling objections to and closing up and vacating a portion of Turk Street from the easterly line of Masonic Avenue to the westerly line of St. Joseph's Avenue” was approved. By said order Turk Street between said streets was reduced in width, by taking therefrom thirty-one feet three inches from its northerly side.

During the proceedings leading up to the adoption of said Order, opposition was made thereto by some of the property owners on the southerly line of Turk Street and the entire subject matter was referred by the then Mayor, James D. Phelan, to the City Attorney for his opinion. On April 12th, 1897, former City Attorney Harry T. Creswell rendered the following opinion:

“Jas. D. Phelan, Esq., Mayor—

Dear Sir: I beg leave to acknowledge the receipt of your communication addressed to me, of which the following is a copy, viz:

'The Board of Supervisors have passed to print an Order reducing the width of Turk Street. Please advise me if the Catholic Archbishop of San Francisco (Alemany), his predecessors, or his successors, ever quit-claimed to the City Turk Street, west of Baker, and oblige.'

I have in my possession an abstract of the title of the property in the City and County of San Francisco known as Calvary Cemetery. The abstract is signed by F. A. Rouleau, Searcher of Records, and bears date May 25th, 1896. The Calvary Cemetery property having been purchased by J. S. Alemany, formerly Roman Catholic Archbishop of the Diocese of San Francisco, no act of his ecclesiastical predecessor in connection therein could have amounted to a dedication of any part thereof for street purposes. He could not have dedicated that which he did not own.

The abstract does not show a transfer of any part of this property to the City and County of San Francisco for public use as a part of the highway known as Turk Street, either by Archbishop Alemany or Archbishop Riordan, his successor, or their predecessors in interest.

Attached hereto you will find a certificate signed by F. A. Rouleau and dated April 10th, 1897, which is self-explanatory.

Respectfully yours,

HARRY T. CRESWELL,
City and County Attorney.

Communication From F. A. Rouleau, Searcher of Records.

San Francisco, Cal., April 10th, 1897, 9 a. m.

Hon. H. T. Cresswell, Attorney and Counsellor—

Dear Sir: I hereby certify that I have made a careful examination of the records in the Recorder's office of the City and County of San Francisco, State of California, to ascertain if J. S. Alemany (formerly Roman Catholic Archbishop of the Diocese of San Francisco) or P. W. Riordan (present Roman Catholic Archbishop of said Diocese of San Fran-

cisco) ever conveyed or quit-claimed any portion of Turk Street to the City and County of San Francisco.

I further certify, after such examination, that there is not of record in said Recorder's office any deed from either said J. S. Alemany or P. W. Riordan, conveying or quit-claiming to said City and County any portion of Turk Street from the westerly line of St. Joseph's Avenue to the easterly line of Masonic Avenue.

O. S. ROULEAU."

In my opinion, the conclusion to be drawn from the opinion of the City Attorney and the certificate of Rouleau is that the City and County of San Francisco had no title to the fee in Turk Street fronting on Calvary Cemetery, but on the contrary the fee was in the Catholic Archbishop of the Diocese of San Francisco, and when the street was narrowed, the title to the land taken therefrom vested in the owner of the abutting land.

My opinion in this regard, is confirmed by the language used by the Supreme Court, in the case of Brown vs. Board of Supervisors of the City and County of San Francisco, 124 Cal., 274, which case involved the question of the power of the Board to pass Order No. 3080, closing that portion of Turk Street between St. Joseph and Masonic Avenue.

Therein the Court gave expression to the following on page 282:

"The suggestion of the appellants that the effect of the order is to give to the abutting owner upon the northerly side of the street the strip of land taken from the street is not available in this proceeding. No such purpose appears upon the face of the order, and the jurisdiction of the board to make the order is not dependent upon the effect it may have upon the title to the vacated portion of the street.

If the closing of this part of the street has the effect to vest the abutting owner with the title thereto, the board is not deprived of its authority to make the order by reason of such result, while, if its effect is to leave the vacated por-

tion of the street public property, it can be disposed of only in accordance with law."

Prior to said decision and on or about April 11, 1898, the Board of Supervisors, acting upon the theory that the City and County did not own the fee, made a grant of the land taken from the northerly side of Turk Street to the Archbishop of San Francisco.

I hereby refer to and make part of this opinion all the proceedings in relation to the closing of Turk Street from St. Joseph's to Masonic Avenues, contained in the Municipal Reports, 1897-99, pages 92 et seq., of the appendix thereof.

In this connection, I refer you to an opinion rendered by me to the Board of Public Works on October 16th, 1911, wherein I advised said Board as to the power of the Board of Supervisors to close that portion of Turk Street under consideration here. So that your Honorable Board may have before it all matters relating to this subject, I will quote the opinion in full:

October 18th, 1911.

Gentlemen: I am in receipt of your communication of the 9th inst., as follows:

'The Board of Public Works, by Resolution 13798, second series, requests that you furnish an opinion as to whether or not a certain portion of Turk Street, between Masonic Avenue and Parker Avenue can be closed.

For your further information, there is herewith enclosed a copy of the petition of the Roman Catholic Archbishop of San Francisco, together with the City Engineer's report relating thereto.'

Opinion.

Under the provisions of Chap. 3, Art. VI, of the Charter the Board of Supervisors is vested with full power to order the closing up in whole or in part of any street within the City and County. This Chapter is almost identical with the

Act of the Legislature, approved March 6th, 1889, (Statutes 1889, p. 70), entitled 'An Act to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane, alley, court or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose.

On April 19th, 1897, the Board of Supervisors passed an order, declaring the northerly thirty-one feet and three inches of Turk Street between Masonic Avenue and St. Joseph's Avenue to be closed and vacated, thereby reducing the width of that portion of Turk Street from one hundred feet to sixty-eight feet and nine inches. Some of the property owners on the south side of Turk Street, where reduced in width, instituted a proceeding for a review of the action of the Board of Supervisors, and a judgment annulling said order, upon the ground that in adopting it the Board acted in excess of its jurisdiction.

The Supreme Court, in said action, *Brown vs. Board of Supervisors*, 124 Cal., page 274., et seq., approved and confirmed the action of the Board of Supervisors, upholding the validity of the proceedings taken to close said street under the Act of 1889, using this language:

'The authority to close a street 'in whole or in part,' which is conferred by the Act of March 7th, 1889, authorizes the board to diminish the width of the street, and the adoption of the order is a determination by the board that the public interest or convenience requires the improvement. 'The legislature has by the statute referred to conferred upon that body the power to open and close streets 'whenever the public interest or convenience may require', and the determination of this question by that body is not open for review by the courts.' (*Symons vs. San Francisco*, 115 Cal., 555).'

The Court also held that no damages were or could be sustained by the owners of property on the southerly side of said street by reason of the reduction in width thereof.

The decision of the Supreme Court, in that case, passing upon the provisions of the Act of 1889 applies with equal force to the provisions of Chapter 3 of Article VI of the Charter, which, as I have already stated, are almost identical.

In view of the foregoing you are advised that the Board of Supervisors possesses full power to order the closing of Turk Street between Masonic and Parker Avenues in accordance with the petition of the Roman Catholic Archbishop of San Francisco."

You are advised that the effect of an order closing that portion of Turk Street of a uniform width of thirty-one feet three inches on the northerly side thereof from Masonic to Parker Avenues would be to vest the title thereto in the owner of the abutting property, namely, the Roman Catholic Archbishop of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Dr. Kellogg Under the Facts Stated is a Resident of the City
and Entitled to His Salary.**

March 30th, 1912.

Gentlemen: I am in receipt of the following communication:

"By direction of Mr. Arthur H. Barendt, President of the Board of Health, I am sending herewith copy of communication received from T. F. Boyle, City and County Auditor, relative to protest against payment of salary of Dr. W. H. Kellogg, Director of Laboratories, and also the affidavit of Dr. Kellogg relative to his qualifications as a resident.

R. G. BRODERICK, Health Officer."

Attached to this communication is an affidavit of Wilfred H. Kellogg, of which the following is a copy:

“STATE OF CALIFORNIA,
City and County of San Francisco, ss.

WILFRED H. KELLOGG, being first duly sworn deposes and says:—I am now a resident of the City and County of San Francisco and my home is at No. 2820 Vallejo Street; I am at present in the employ of the City and County of San Francisco in the Health Department thereof, as Director of Laboratories. I am informed that some question has been raised as to my eligibility to hold that position on the ground that I have not been a resident of the City and County of San Francisco for one year prior to my appointment. The facts are these: I own the premises No. 2820 Vallejo Street and resided there until about the 15th day of September 1908, when I entered the employ of the United States and went in that service to South America returning in December, 1910. During the interim, I had leased my house and pending the expiration of that lease went to live at my mother's home in Berkeley. As soon as the lease expired I made some changes in my home and again moved into it. It has always been my intention to live in San Francisco, it is my home now and it was my home before I entered the Government service. I have never registered anywhere else and I have registered in San Francisco. I have never intended to make my home anywhere else and when I entered the government service it was with the intention of returning here to my home. So far as my intention to return to my home here is concerned, I point to the foregoing statement of facts and believe I am clearly within Section 1239 of the Political Code of this State under Subdivisions 2 and 3 thereof and am a bona fide resident of San Francisco.

WILFRED H. KELLOGG.

Subscribed and sworn to before me
this 16th day of March, 1912.

(Seal.) E. LEVY,

Notary Public in and for the City and County of San Francisco.

In my opinion, based upon the facts as alleged in this affidavit, Dr. Kellogg at no time intended to leave San Francisco permanently and at all times considered San Francisco to be his residence and for that reason he has not lost residence so as to make him ineligible to appointment in this City and County under Section 2 of Article XVI of the Charter, which provides that:

"All deputies, clerks, assistants and other employees of the City and County must be citizens of the United States, and must, during their respective terms of office or employment, actually reside in the City and County, and must have so resided for one year next preceeding their appointment."

We are assisted in our interpretation of such section by referring to the Political Code, Section 1239 which states the rule to be followed by the Board of Election in determining the place of residence of any person under the election laws of this State, where it is said, in Subdivision 1:

"That place (of residence) must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning."

And Subdivision 2, reading:

"A person must not be held to have gained or lost residence by reason of his presence or absence from a place *while employed in the service of the United States*, or of this State. * * * " And Subdivision 3, reading: "A person must not be considered to have lost his residence who leaves his home to go into another State, or precinct in this State, *for temporary purposes merely, with the intention of returning.*"

It will be seen from Dr. Kellogg's affidavit that he has at all times considered San Francisco as his home and that as regards his living in Berkeley upon his return from his United States Government service, it was merely temporary.

You are therefore advised that Dr. Kellogg is qualified by this appointment as Director of Laboratories, so far as his

residence is concerned under the facts which have been placed before me.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

**It is Lawful to Build a Three-Story Tenement House With a
Basement Provided the Basement is to be Uninhabited.**

April 1st, 1912.

Gentlemen: I am requested to advise your Board as to whether the Tenement House Law will permit of the building of a three-story wooden tenement house, exclusive of basement, provided the basement is to be uninhabited.

Owing to the rush of other matters in this office, I am unable at this time to give you an extended opinion upon which my conclusion as to this question is based. Inasmuch, however, as there are many property owners desiring to build wooden tenement houses, their work being delayed by reason of the pendency of this question before me, I will state to your Board my conclusion in this matter.

I am of the opinion that a property owner may build a three-story wooden tenement house exclusive of basement, provided that the basement is uninhabited and so long as the building meets the other requirements of the Tenement House Law and the ordinances of the City and County of San Francisco with reference to height. The sizes of courts of this character of tenements will be determined by the scale fixed in the Tenement House Act for three stories.

My conclusion in this matter applies solely to the three story and basement tenement house where the basement is uninhabited and is not designed for habitation.

Within the next few days I will state to you fully in writing the reasons upon which I base this conclusion. Pending that time the Board should issue permits for the erection of

wooden tenement houses comprising three stories and a basement so long as the basement is uninhabited and is not designed for habitation.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

City Property Erroneously Assessed and Sold to State for Non-Payment of Taxes.—Assessment May be Cancelled and the Board of Supervisors May Direct the Recorder to Cancel Certificate of Sale.

April 5th 1912.

Gentlemen: I am in receipt of your communication enclosing a list of City property sold to the State for non-payment of taxes with the request that I examine the correctness of said list and proceed to have same cancelled under the provisions of Section 3804a of the Political Code.

Section 3804a of the Political Code is a new section relating to the cancellation of erroneous assessments, approved March 8th, 1911. Under that Section the Board of Supervisors may, upon satisfactory proof that the property that is exempt from taxation has been erroneously assessed, or that improvements which did not in fact exist when the taxes became a lien have been erroneously assessed on real estate, with the written consent of the City Attorney and by an Order entered upon its minutes, direct the Auditor to cancel such assessment and if real property has been sold to the State for non-payment of the taxes levied on such property or improvements so erroneously assessed, and a certificate of sale or deed therefor has been issued to the State and the State has not disposed of the property so sold the order of the Board shall also direct the Recorder to cancel the certificate of sale or deed so issued so far as the same relates to such exempt property or non-existing improvements.

I find on examination of the list of property transmitted to me by your Honorable Board that some of the parcels sold to the State for taxes were owned by the City and County of San Francisco at the time of the levy of the assessment and the sale to the State. There are other parcels, however, which did not belong to the City and County at the time of the levy of the assessment and the sale. There may have been some doubt as to whether or not the provisions of Section 3804a of the Political Code applied to land not owned by the City at the time of the levy of the taxes and the sale thereof to the State. That question was presented to the Supreme Court in the case of *Smith vs. City of Santa Monica*, a municipal corporation, reported in *California Decisions* of February 20th, 1912, at pages 209 et seq. The rule is laid down in that case as follows; quoting from the syllabus:

“A sale by the State of land previously sold to it for delinquent taxes is unauthorized and void, where such land after the sale to and prior to the sale by the state has passed into municipal ownership for public purposes under condemnation proceedings.

When a municipal corporation acquires property under such circumstances, the title which the state takes by the tax collector's deed is merged into the larger title which the municipality holds under the trusts both for the public as distinguished from the state, and also for the state as the supreme sovereign as well.

Whenever a municipal corporation or public agency of the state owns real property used for the purposes of such agency, the ultimate title is in the state itself.

An assessment for purposes of taxation levied upon public property of a mandatory or agency of the state is void.”

It appearing therefore that the land included in the list of property transmitted to me belongs to the City and County of San Francisco and that the same was erroneously assessed and that this is a proper case for the cancellation of such assessment, I hereby give my consent to such cancellation, and the order of the Board directing the Recorder to cancel the

certificate of sale or deed issued as to any parcel of land in said list sold to the State for non-payment of the taxes levied on said property or improvements so erroneously assessed and a certificate of sale or deed therefor has been issued to the State and the State has not disposed of the property so sold so far as the same relates to such exempt property or non-existing improvements.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Ordinance Creating a Bureau of Police Department for Inspection of Weights and Measures is in Legal Form.

April 8th, 1912.

Gentlemen: I am in receipt of your communication enclosing a copy of a proposed ordinance providing for the creation of a bureau as a part of the Police Department for the inspection of weights and measures and repealing a former ordinance governing weights and measures, with a request that I advise your Board as to the validity of the ordinance.

I have examined the ordinance and in my opinion the ordinance is legal and in proper form and if the Board desires to adopt the ordinance it has the legal right so to do.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Bid of Bates, Borland & Ayre for Construction of Geary St. Railway Valid and Being the Lowest Bid Said Firm Must Sign the Contract or Forfeit Check Accompanying Bid.

April 10th, 1912.

Sir: I am in receipt of your communication of April 5th, 1912, requesting me to advise you "whether or not the bid of Bates, Borland & Ayer for the construction of the Geary Street Road is proper and whether, if the contract is entered into with Bates, Borland & Ayer and they fully completed their contract, they would be entitled to receive their money in full, including the bonus."

Facts.

It appears that on March 12th, 1912, pursuant to an authorization of the Board of Supervisors, the Board of Public Works began the publication in the official newspaper of an advertisement calling for bids for the construction of the Geary Street Road. The advertisement reads as follows:

"Sealed proposals will be received at this office between the hours of 2 o'clock p. m. and 3 o'clock p. m. on Wednesday, the 27th day of March, 1912, for doing the following work, to-wit:

The Railway Track Construction on Geary Street, between the westerly line of Kearny Street and a point near the westerly line of Fifth Avenue.

Progressive payments will be made.

Said work must be done in accordance with the plans and specifications therefor on file in the office of the Board of Public Works, to which reference is hereby made, and must be commenced within fifteen (15) calendar days and completed within one hundred and eighty (180) calendar days from the date of the contract to be made and entered into therefor.

The amount of bond for faithful performance has been fixed at \$75,000.00.

All proposals offered shall be accompanied by a check certified by a responsible bank, PAYABLE TO THE ORDER OF THE CLERK OF THE SUPERVISORS of said City and County for an amount not less than ten per centum of the aggregate of the proposal.

Printed proposal forms will be furnished gratuitously upon application at the office of the City Engineer, room 1408 David Hewes Building, and all proposals must be made upon such forms.

The Board of Public Works reserves the right to reject any and all bids.

By order of the Board of Public Works.''

At the time that this advertisement began running there was on file in the office of the Board of Public Works plans and specifications of the work to be done and also a statement of the conditions and agreements which were to be inserted in the contract to be entered into with the successful bidder. This statement included all the various conditions, covenants and agreements inserted in City contracts for public work of this character.

Before the advertisement had been completed and before the time set for the reception of bids, it was decided by the Board of Supervisors and the Board of Public Works that it was advisable to make more stringent the provisions of the contract governing the extensions of time and penalties and also to offer to the successful bidder a bonus of \$250 a day for each and every day that he completed his work within the time set for the completion of the same.

Before this had been decided upon a number of contractors intending to bid upon the work had called upon the Board of Public Works and had received copies of the plans and specifications and the statement of the conditions which were to be inserted in the contract. When these changes and the bonus were finally determined upon the Board of Public

Works sent out immediately to each of these contractors who had called for plans and specifications and the statement of conditions, the amendments to those terms and conditions and inserted the same in the plans and specifications and the statement of the conditions delivered to such contractors. The Board likewise inserted these amendments in the statement of conditions remaining in the office of the Board and every contractor thereafter who received plans and specifications and the statement of conditions of the contract received the same with these amendments. All this was done prior to the time set for the reception of bids. Every contractor who bid upon the work bid thereon fully knowing of these conditions.

The Board of Supervisors, while the advertisement was still running, passed a resolution authorizing the Board of Public Works to make these changes. An ordinance to the same effect was passed to print at the same time and was finally adopted the following week. The passage of the resolution and the ordinance was done through an abundance of precaution so as to offer every possible protection to the contractors.

At the hour set in the advertisement for the reception of bids, the Board of Works met in open session, remained in session for the hour specified in Section 17 of Chapter I of Article VI of the Charter and received all the bids for the work. There were ten bids submitted. At the expiration of the hour the Board of Public Works opened the bids and recorded the same. Among the bids offered was one by Bates, Borland & Ayer, a copartnership, which was the lowest bid in point of price by many thousands of dollars. Their proposal was made upon the form furnished to them by the Board of Public Works, pursuant to Section 16 of Chapter I of Article VI of the Charter. It was signed "Bates, Borland & Ayer, by A. Borland, 26 Montgomery St., San Francisco, California." Accompanying the bid was a certified check in the amount of \$25,000 on the Crocker National Bank. The proposal contained an affidavit which reads as follows:

“STATE OF CALIFORNIA.

City and County of San Francisco. ss.

A. BORLAND, being first duly sworn, deposes and says: That he is a member of the copartnership of Bates, Borland & Ayer, the party making the foregoing proposal or bid; that such bid is genuine and not collusive or sham; that said bidder has not colluded, conspired, connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid, or that such other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against the City and County, or any person interested in said improvement, for himself or for any other person.

(Signed)

A. BORLAND.

Subscribed and sworn to before me
this 27th day of March, 1912.

C. H. LAUMEISTER,

Commissioner Board of Public Works,
City and County of San Francisco.”

Bates, Borland & Ayer, being the lowest bidder, and it appearing to the Board of Public Works that their bid was regular in form, the Board awarded the contract to that firm. After the award had been made the Board notified Bates, Borland & Ayer to appear before the Board on Wednesday, the 10th day of April, 1912, to execute the contract and present the bond required of successful bidders by the Charter for the Board's approval.

The firm of Bates, Borland & Ayer now contends that a contract entered into with the City and their firm under the facts hereinabove related would be void and no legal liability would rest upon the City. This contention is made upon three grounds:

1st. That the affidavit hereinabove set out does not comply with Section 16 of Chapter I of Article VI of the Charter relating to affidavits which must accompany bids.

2nd. That the offer of a bonus by the City is not authorized by the Charter.

3rd. That the change in the conditions as to the penalty and extensions of time and the offer of the bonus is not authorized by the Charter.

I will consider these objections in the order presented.

Opinion.

First Objection.

Section 16 of Chapter I of Article VI of the Charter provides among other things, that each bid shall have thereon "the affidavit of the bidder that such bid is genuine and not collusive or sham", etc. As pointed out, the bid in question was presented by a copartnership. The copartnership of Bates, Boarland & Ayer in this case is **the** bidder. A copartnership has a legal entity and is recognized in law as something different than an individual or an association of persons not assuming in that association the full responsibility of copartners.

It appears affirmatively from this proposal that the firm of Bates, Boarland & Ayer, in the capacity of a copartnership, presented this bid. The affidavit shows affirmatively that one member of that firm, on behalf of the firm, made the affidavit required by the Charter. It is my opinion that this meets with the literal as well as the substantial requirement of Section 16 of Chapter I of Article VI of the Charter. There is nothing in that section which would require every member of a firm to make an affidavit any more than there is in that section a requirement that every officer, stockholder or member of a corporation should make an affidavit where a corporation is bidder.

The copartnership itself as a legal entity cannot make an affidavit and some one on behalf of the copartnership must make it, just as a corporation itself as a legal entity cannot make an affidavit but some one on behalf of the corporation must make it. Any other interpretation of Section 16 of

Chapter I of Article VI of the Charter would lead to this conclusion: either a firm or a corporation is not required to make an affidavit because they cannot make the affidavit, or a firm or corporation cannot be a bidder for city work for that reason. It is a well defined principle of law that one member of a firm has a right to bind his firm and I am firmly of the opinion that it is a strained construction of Section 16 of Chapter I of Article VI of the Charter to hold that every member of a firm must make an affidavit.

The contention made by Bates, Borland & Ayer as to this affidavit arises from a misunderstanding of the rule of the case of Flinn vs. Strauss found in 4 Cal. App. Rep. p 245. The facts of that case and this case are entirely different. That case in the first place was an assessment case, a contract in *invitum*. The distinction between such contracts and contracts entered into by the City in its proprietary capacity will be hereinafter pointed out.

In the second place it appears that the proposal was signed by two persons "Flinn and Treacy". There was nothing in the proposal showing that Flinn and Treacy were copartners. The affidavit was signed by one "Jas. J. Flinn." In the body of the affidavit his name was not set forth as the affiant thereof. The affidavit stated that "he (blank) was the party" making the proposal or bid. The Court, under those facts, held that the affidavit did not meet the requirements of the San Francisco Charter. In that behalf the Court says:

"Although this instrument purports to have the signature of 'Jas. J. Flinn,' his name is not set forth in the body of the instrument as the affiant thereof, and the instrument itself is without date and is not authenticated as being his affidavit by any official signature or seal. The official character of 'H. J. Smith' is not shown, either in the body of the affidavit, or by having any official description written after his signature, and it does not appear on the face of the instrument that he was an officer authorized to take an affidavit, nor was there any evidence given at the trial of the cause that he had such authority. The proposal of the plaintiffs to

do the work purports to have been made by two persons, 'Flinn and Treacy,' and the complaint alleges that they were partners and made the proposal, and that it had thereon the affidavit of each of them; but the statement in the purported affidavit of Flinn 'that he is the party making the foregoing proposal' is at variance therewith. The provision in the Charter requiring 'the affidavit of the bidder' is not satisfied by the affidavit of one of several bidders. The purpose of the provision is to prevent collusion and fraud, and to sift the conscience of the bidder, or of all of the bidders if there be more than one; but an affidavit of one of several bidders might be made in good faith notwithstanding a collusion on the part of one or more of his associates.'

It thus appears that the Flinn case and this case are entirely different in their facts. In an assessment contract where the cost of work is to be assessed upon property owners who have not consented to the contract the tendency of the Courts is to examine and scrutinize closely the proceedings leading up to the contract, holding the contractor to a literal compliance with every provision of the law, though in recent cases (see *City Street Improvement Co. vs. Kroh*, 158 Cal., 327) the Courts show a strong disposition to abandon the reasoning of earlier cases which have denied payment to contractors who have entered into contracts in good faith and fully performed their work.

In view of the difference between the facts of the Flinn and Strauss case and this case and in view of the fact that the Flinn case was a case of a contract in *invitum* and this is a contract of the City in its proprietary capacity, I am of the opinion that the affidavit in the proposal of Bates, Borland & Ayer meets fully the requirements of the Charter.

Second Objection.

The objection to the bonus is made upon the ground that there is nothing in the Charter authorizing the giving of a bonus. The argument is made that the offering of a bonus

might tend to stifle competition. It is contended that "intending bidders might have at their command an outfit and 'plant' sufficient to enable them to do the work in one hundred and eighty days and not sufficient to enable them to do the work in any less number of days. For this reason they might conclude that it was useless for them to compete with men with larger outfits and plants."

In my opinion, simply because the Charter does not prohibit the offering of a bonus a bonus may be offered. It is a settled principle of law that where a City is authorized to enter into contracts and no mode or procedure is described or limitations set upon that right, that the City may adopt the mode or procedure and such conditions as sound business judgment dictates so long as the contract is free from taint or fraud. (Dillon on Corporations.) Where limitations are found in the law authorizing the making of contracts by municipal corporations that general power of the municipality still remains subject only to the limitations set out in the law. Of course nothing can be done which substantially or in any way deprives those limitations of their full effect or which avoids the objects to be served by them. In reading over the provisions of our Charter relating to the contracts made by the City in its proprietary capacity I can find no provision which would be in any manner affected or nullified in the least by the offering of a bonus. The argument that the offering of a bonus tends to stifle competition is indeed a remarkable one for it is almost the universal opinion of the business world that the offering of a bonus tends to stimulate competition. In addition, the firm of Bates, Borland & Ayer has made the contention that they are relying and did rely greatly upon the bonus offered. I am, therefore, of the opinion that the offer of the bonus does not affect the validity of the contract.

Third Objection.

The third objection is made upon the ground that inasmuch as the plans, specifications and conditions of the con-

tract as originally filed by the Board of Public Works did not contain this bonus offer and the extension of time and penalty provisions, an intending bidder **might** have visited the office of the Secretary before those changes were made and finding that there was no bonus offered, have refused to compete and, also that the world not having been informed by the original plans and specifications and the statement of the conditions of the contract of this offered bonus **might** tend to stifle competition.

This argument is in contradiction of the argument that no bonus could be offered at all, for in one breath it is stated that the offering of the bonus **might** stifle competition and in the next breath it is said that because no bonus is offered competition might be stifled. The objection rests in the realm of conjecture. There is no showing that competition was stifled at all. On the contrary, every intending contractor was notified of this offer and a copy of the offer was given him and every contractor who bid upon the work had this offer before him prior to the time his bid was made. It is not assumed nor is it required that every contractor in the whole world should be able to do the city work and the very character of work done by the city necessarily limits the number of contractors and shuts out some. The only requirement to be met in competitive bidding is that all contractors shall be placed upon the same basis and that no condition shall be demanded of bidders which tends to unreasonably restrict the number of bidders.

The only difficulty arising out of this objection is whether the Board in making the advertisement complied fully with Section 15 of Chapter I of Article VI of the Charter. In the first place the advertisement does state everything that is required to be stated in the advertisement. In the second place the plans and specifications referred to in Section 15 are the plans and specifications "giving full details and description of the work and materials."

The offer of a bonus or the provision for a penalty is not "a plan or specification of the work or materials." Even

though it could be considered as such, I am of the opinion that the plans and specifications after they have been filed and before bids have been received could be modified in detail so long as the general description of the work as set out in the advertisement was not changed and so long as the modification did not affect competitive bidding. A bonus in its very nature is a voluntary offer by one of the parties to the contract to the other that if that other person will do something in addition to that required by the contract that he will receive a suitable reward. With this bonus the contractor has nothing to do. The offer does not come from him, it comes from the other person. It is true, of course, that he may be encouraged by the offer, but with the terms of the offer he has nothing to do. Of course, if it affirmatively appears that the neglect to make this offer at the very beginning prevented free competition or that the offer is tainted with fraud the offer would be illegal.

In the present case the contrary appears. As a matter of fact Bates, Borland & Ayer complain that they have bid too low. In order to show that this offer, made as it was, affected competition it would be necessary to indulge in a further conjecture—that is, that some person if he had know of this offer in time would have bid still lower than Bates, Borland & Ayer and consequently lose more money on the contract than Bates, Borland & Ayer claim they will lose.

This question of the effect upon intending bidders was discussed in the case of *Rice vs. Board of Trustees*, 107 Cal., at page 401, as follows:

“Assuming, for the purposes of this argument, that the action of individual members of the board in directing the engineer to inform intending bidders that no bid for the work would be received unaccompanied by a bid for the purchase of the bonds, can be regarded, as is contended by appellants, as the act of the board; and that the same was unauthorized and improper, as tending to restrict bidding to those able to take or desirous of taking the bonds, it nevertheless does not appear that any injury was worked thereby.

There is no evidence that any one was deterred by that fact from bidding on the contract, or that any person would have bid without such condition who did not bid with it. Nor is there any evidence to show that the bids that were put in were any higher by reason of that supposed condition than they would have been without it. Under such circumstances, where no fraud or bad faith are shown, and no injury appears to have accrued from the irregularity complained of, it will not be regarded as sufficient ground for relief in equity."

It is also said that this practice, if permitted, would lead to unlimited fraud. That, in my judgment, is the flimsiest of arguments. If a bonus can be offered at all it seems to me that it can be offered at any time so long as the contractors are properly notified of the offer. That the offer of a bonus would lead to unlimited fraud strikes at the very right of the City to offer a bonus. It is not to be assumed that public officials will use a power or discretion lodged in them to defraud the City and the same argument that fraud can be committed in the exercise of this power would defeat every action by any official when that action is taken under a discretion given to him. I am of the opinion that it must be shown (1) that the offer of the bonus is improvident, or (2) that the offer was made for a fraudulent purpose.

Conclusion.

I am, therefore, of the opinion that if Bates, Borland & Ayer enter into the contract with the City for the doing of this work and fully complete their contract that they would receive every cent that the City agreed to pay them. The Courts in their latter decisions show a marked tendency to deny to the City the right to refuse payment to a contractor who has entered into the contract in good faith and who has fully done his work.

This is clearly marked in contracts of this character. Municipal contracts are of three kinds, viz:

(1) Contracts in *invitum*, that is, contracts for public improvements where assessments are levied upon property owners without their consent.

(2) General contracts, such as contracts for construction of public buildings, sewers and the like, and

(3) Contracts made in the City's proprietary capacity where the City is undertaking a semi-public business, such as a street railroad.

The distinction between the second and third classes is not so marked, but the Courts have noted a slight difference. As to the first class, the contractor is held quite rigidly to every requirement of the law since the contract is not invited by the property owner. As to the second class, a city will not be permitted to escape responsibility unless there is an absence of power to make the contract or a material and substantial departure from the mode prescribed for the letting of contracts. As to the third class, unless there is an absence of power to make the contract or such a clear and substantial variation from the mode prescribed for the letting of contracts as to work to the positive detriment of the city, the city cannot escape liability where the contract has been fully performed.

Certainly as to the latter class of contracts the Courts will not allow a theoretical possibility or a technical objection in the proceedings leading up to the letting of the contract deny to the contractor what justice and equity demand. In this regard see *City Street Improvement Company vs. Krob*, 158 Cal., 308, at page 326.

There is one further consideration in this matter. If the affidavit is proper and the only objection to the contract is that the bonus was offered too late, the only result would be that the contractor would lose the bonus, a result, of course, which is not desired and which, I am of the opinion, would not occur. A provision in a municipal contract unlawfully inserted does not defeat the whole contract, but only defeats that portion of the contract which is void.

What position, consequently, must the City take? Bates, Borland & Ayer have, with their eyes open, presented to the City an offer and accompanied that offer with a certified check. Any mistake in the affidavit was their mistake. They had as much opportunity to judge of the validity of the bonus offer as the City had.

I am of the opinion that the proceedings are correct. There is no way of foreseeing what eventually the Courts may hold in a given case. In this instance, of course, there is the possibility that the Courts may reach a conclusion different from that here presented, but should that possibility in justice require the City to permit Bates, Borland & Ayer to now withdraw from their contract? The Charter, Section 17, Chapter I, Article VI, provides that if the contractor does not enter into the contract when the bid is awarded to him, he shall forfeit his check and that "neither the Board of Public Works nor the Supervisors shall have power to relieve from or remit such forfeiture." Such action rests solely with the people for whom all officials are trustees. In this connection I call your attention to the language in *Kimball vs. Hewett*, 2 N. Y. Supp. 698, which is as follows:

"Had the defendants been acting in their own private business, there is no doubt that they could have permitted the offer made by the Electric Construction Company to be withdrawn, but acting as public officers, they could not lawfully forego the right that the city had acquired to insist that the company should either carry out its offer or forfeit the amount that it had deposited as security. When the bid of the Electric Company, with the certified check that accompanied it, passed into the hands of the commissioner of public works, the statute prescribed the disposition that should be made of the one and the other. The bid was to be publicly opened by the officers, who are the defendants in this action, and the contract was to be awarded to the lowest bidder. If the lowest bidder should refuse to execute, that is to say, sign the contract within five days after notice that it had been awarded to him, the amount of the certified check that

he had deposited as security was to be forfeited, and retained by the city as liquidated damages, and paid into the sinking fund. No other disposition of the bid and check was lawful. It has been decided that where the statute requires a public officer to award a contract for public work to the lowest bidder, he may be restrained by injunction from giving it to any one else. (2 High, Inj. paragraphs 1251, 1252,) and principle requires that the highest bidder should not be made the lowest bidder by the withdrawal of the lower bids. It matters not how honestly the officials acted, (and no one questions the absolute integrity of the distinguished gentlemen who are the defendants,) their consent to the withdrawal of the bid was in conflict with the statute."

I advise you, that in my judgment, if Bates, Borland & Ayer fully completed their contract they would receive every dollar called for by the contract and that no taxpayer's suit could prevent such payment, for a taxpayer, after the completion of the contract, could only raise the same objections that the City could raise, and, further, even conceding for the sake of argument, that there is a question as to the legality of the contract, the doubt must be resolved in favor of the City and, therefore, the check must be forfeited if Bates, Borland & Ayer refuse to sign the contract. The responsibility for the result of such refusal rests with them.

Respectfully,

PERCY V. LONG,

City Attorney.

The Mayor.

Right of Attorney Admitted to Practice in Superior Court Under Section 276 C. C. P. (as Amended in 1880) to Practice in Police Court Under Art. IV, Chap. VIII, Sec. 16 of the Charter.

April 11th, 1912.

Sir: I am in receipt of your communication of March 30th, 1912, requesting me to advise you on the following matter:

Has an attorney, admitted to practice in the Superior Court of San Francisco, in 1886, under Section 276, Code of Civil Procedure, (as amended in 1880, Code Amendments 1880, p. 55) and repealed in 1895, (Stats. 1895, p. 56), the right to practice in the Police Court of the City and County of San Francisco?

Said Section 276, C. C. P. (Stat. 1880, p. 55) read as follows:

“276. Qualifications.

Sec. 276. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court, as to his qualifications by the justices of the Supreme Court, or by the justices sitting and holding one of the departments thereof, provided, that the several superior courts of this state may admit applicants to practice as attorneys and counselors in their respective courts, but not elsewhere, upon strict examination in open court, and not otherwise, and upon satisfactory testimonials of good moral character.”

Under this proviso a superior court could admit an attorney to practice before the courts of the county where admitted. The present police court, though re-constituted by the Charter of 1900, is, in a great measure, the successor of the older police court, especially in matters of jurisdiction.

The older “Police Court in and for the City and County of San Francisco,” created by the Legislature, February 23rd, 1893, (Statutes of California, 1893, Chap. XV, Sec. 4) prescribed the qualifications of attorneys as follows:

“Sec. 4. No person except a licensed attorney of the Superior Court of this State shall practice law in said Court; providing, however, that a person accused of crime shall have the right to defend himself.”

Therefore, in 1893, by the above Statute, this attorney was authorized to practice in the Police Court of San Francisco, since he had, under Sec. 276 C. C. P. been admitted to practice in the “Superior Court of this State.”

Likewise, it was perfectly competent for the Charter of 1900 to prescribe the qualifications for attorneys practicing in the Police Court created by it. This the Charter has done in Art. IV, Chap. VIII, Sec. 16, where the following language is used :

“No attorney shall appear in said court to prosecute or defend persons charged with offenses, unless at the time of his appearance he be qualified to practice law in all the courts of this State.”

There is no question of the validity of this Charter provision, viewed prospectively, but, in the words of Justice Temple, in the case of *Pignaz vs. Burnett*, 119 Cal., 161, (Dec. 1897) :

“* * * Laws which create new obligations, or impose new duties, or exact new penalties * * * have been universally reprobated by civil and common law writers. This is especially so where to give the statute retrospective effect would work manifest injustice.”

This view of the construction of such statutes was reiterated by Chipman, P. J., in the *Estate of Richmond*, decided in 1908, (9 Cal. App., at 411).

“The general rule is that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. It is always presumed that statutes were intended to operate prospectively, and all doubts are resolved in favor of such a construction.”

If, under Sec. 276 of the Code of Civil Procedure of 1886, an attorney was licensed to practice in the Police Court of San Francisco, such a license is not extinguished by the provision, (Art. IV, Chap. VIII, Sec. 16) of the 1900 Charter of the City and County of San Francisco.

In view of the foregoing you are advised that an attorney admitted to practice in the Superior Court of San Francisco under the proviso of Sec. 276 of the Code of Civil Procedure,

as it existed in 1886, is entitled to practice before the Police Court of the City and County of San Francisco today.

Respectfully,

PERCY V. LONG,
City Attorney.

Hon. D. C. Deasy.

Jefferson Street, East from Van Ness Avenue to Larkin Street, is in Private Ownership.

April 4th, 1912.

Dear Sir: I am in receipt of your letter of the 27th ult., inquiring as to whether or not Jefferson Street easterly from Van Ness Avenue is a public street of this City and County. Therein you call my attention to a blue line print in a case entitled Dore, et al, vs. Truett, et al., referee's report made, division to parties, as written in report filed January 29th, 1904, and approved by court and decree dated

I find that Jefferson Street easterly of Van Ness Avenue to Larkin Street was included in the lands affected by the decree in the case of Ellen Dore, et al. vs. Mortimer K. Truett et al., which was an action brought for the partition of the tract of land known as the "North Peter Smith Tract" in this City and County. The City and County of San Francisco was made a defendant in said action and appeared therein and is bound by the decree of the court therein made.

The lands affected by the decree in said action originally lay below high water mark and were tide lands in the Bay of San Francisco. That upon the admission of the State of California into the Union upon equal footing with the original states, the property in said lands passed to and vested in the State of California. That on the 26th day of March, 1851, the Legislature of the State, by an act duly passed, granted the use and occupation of said property to the City and County of San Francisco for a term of ninety-nine years from and after the said 26th day of March 1851. That thereafter

and on the 6th day of September, 1851, one Peter Smith duly recovered a judgment against the City of San Francisco in the Superior Court of San Francisco for the sum of \$13,960, which judgment was then and there duly given, made and entered.

That afterwards and on or about the 8th day of December, 1851, an execution was duly issued to the Sheriff of the City and County of San Francisco on this judgment and duly levied by him upon the interests of said City of San Francisco in a certain piece or parcel of land in said City which embraces the land affected by said decree and which, as I have said, includes Jefferson Street easterly from Van Ness Avenue to Larkin Street. That afterwards and on or about the 30th day of January, 1852, the interest of the City of San Francisco was sold by the Sheriff under said execution to one Isaac Thorne.

The entire matter of partitioning the property was referred to William A. Magee who was appointed sole referee upon the stipulation of all the parties to the action. Thereafter he rendered his report in which he continued certain streets through the said tract of land and the court in said decree confirmed said extensions as follows: (Quoting from the decree):

“That he has continued and extended Laguna Street and Buchanan Street as the same are laid down and designated on the official map of the City and County of San Francisco northerly and parallel to Larkin Street through said tract from their present termini at the southerly boundary of said tract to Lewis Street, the north boundary of said tract; and he has set apart as streets those portions of said tract embraced in the boundaries of said Laguna Street and Buchanan Street extended, both said streets are of a uniform width of 68 feet and 9 inches and are set apart as public streets to be known by the names of the present streets of which they are continuations or extensions.

“That he has continued and extended Jefferson Street as the same is laid down and designated on the present offi-

cial map of the City and County of San Francisco easterly and parallel to Lewis Street from Buchanan Street extended to the pueblo line and he has set apart as a street that portion of said tract embraced within the boundaries of said Jefferson Street; said Jefferson Street is of a uniform width of 68 feet 9 inches and is set apart as a public street, to be known as Jefferson Street."

The Court in said decree, in passing upon the rights of the City and County of San Francisco in and to the land described in said decree, used this language:

"The City and County of San Francisco has no interest in the tract of land described in the interlocutory decree and hereinbefore described, except that portion thereof included in the lines of Lewis Street, Tonquin Street from Larkin to Polk Streets, and Polk Street from Tonquin to Lewis Streets and no portion of said land, except that portion within the lines of Lewis Street, Tonquin Street and Polk Street above mentioned, has ever been a public street of the City and County of San Francisco and no portion thereof (with the same exception) has ever been laid out or dedicated to the public use and there are no streets now existing on said tract of land or any portion thereof, except Lewis Street, Tonquin Street from Larkin Street to Polk Street, and Polk Street from Tonquin to Lewis Streets."

I have had a diagram prepared by Mr. C. H. Holcomb of your office, showing the boundary of the tract, subject to the referee's report, which is shown in red, and the streets which the court decreed belong to the City and County of San Francisco, and also those which were continued or extended by the referee in his report, all of which streets are shown on said diagram in yellow. For your information I will append said diagram to this letter.

Attached to the copy of the decree in said action is a copy of the certificate of the County Clerk certifying that said decree is a full, true and correct copy of the original final decree in the above entitled cause filed in the office of the County Clerk on the 29th day of March, and also a memo-

random showing that a true copy of the original was recorded at the request of William B. Sharp on April 8th, 1904, at 3 p. m., in Liber 2046 of Deeds, pages 225 to 246 inclusive.

In my opinion the decree in partition in the above action is conclusive and determinative of the rights of the City in and to the streets embraced within the tract of land affected by the decree and that Jefferson Street easterly from Van Ness Avenue to Larkin Street is in private ownership according to the terms of said decree and therefore is not a public street of this City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

City Engineer.

**Mendocino County Liable for the Care of Its Indigent Sick
by the Relief Home.**

April 13th, 1912.

Sir: I beg to acknowledge receipt of your communication of the 8th inst., with reference to the case of George Cochoris, who worked for the Northwestern Pacific Railroad Company at Willits, and who, after meeting with an accident, was brought to the City and County by the Northwestern Pacific Railroad Company. The questions presented to me for answer are as follows:

“First. That the accident happened in Mendocino County and Mendocino County should be responsible for his care.

Second. The Northwestern Pacific Railroad Company moved a dependent person without funds to San Francisco County and there left him a permanent charge upon said County.

Query: Is there any way in which the Northwestern Pacific Railroad Co., could be forced to pay for his care while in our hospital and be forced to transfer him back to Mendo-

cino County, and how can Mendocino County be made to receive him?"

Under the Act of the Legislature entitled "An Act to provide for the maintenance and support, in certain cases, of indigent, incompetent and incapacitated persons (other than persons adjudged insane and confined in State Hospitals), becoming a public charge within the counties or cities and counties within the State of California and for the payment thereof into a fund for the maintenance and support of such persons. Approved March 23rd, 1901," every person, firm or corporation, or officers, agents or employees of any person, firm or corporation bringing into or leaving within or procuring the bringing into or leaving within or aiding in the bringing into or leaving within, any pauper, or poor or indigent or incompetent person as hereinbefore mentioned in any county, or city and county in the State of California wherein such person is not lawfully settled or lawfully residing as in said Act defined to be such pauper, poor, indigent or incompetent person, shall be guilty of a misdemeanor.

It seems to me, therefore, that if the Northwestern Pacific Railroad Company brought said George Cochoris, said indigent person, from the County of Mendocino into the City and County of San Francisco, knowing him to be such indigent person, the said Company comes within the purview of the law and liable to be proceeded against as in said Act provided. However, I do not see that there is any way to compel the Northwestern Pacific Railroad Company to return said George Cochoris to Mendocino County.

With reference to the liability of Mendocino County for the care of said indigent person I will say that the same Act provides that it shall be the duty of the County Clerk of the City and County of San Francisco to send written notice by mail, or otherwise, to the County Clerk of Mendocino County requesting the proper authorities of said County to remove such person and to pay the expenses accruing or to accrue in taking care of such person. The City and County of San Francisco, under said Act, shall be entitled to payment by

the County of Mendocino of reasonable charges for taking care of said indigent person and in case of the refusal of Mendocino County to pay said charges the same may be recovered by a suit in any court of competent jurisdiction.

I would suggest that you take this matter up with the County Clerk of the City and County of San Francisco and call his attention to the provisions of the Act of March 23rd, 1901, which can be found in Statutes of 1901, at page 636, et seq., and, in case the facts justify such a suit, in the event that Mendocino County fails to pay this City and County for charges for the expense and maintenance of said indigent person, I will, on being notified of that fact, institute proceedings to recover the same.

Respectfully,

PERCY V. LONG,
City Attorney.

C. M. WOLLENBERG,

Superintendent of Relief Home for Aged and Infirm.

Mayor Not Bound to Act Upon Recommendation of Grand Jury, Though its Report Entitled to Great Consideration.

April 15th, 1912.

Hon. James Rolph, Jr.,

Mayor of the City and County of San Francisco:

My Dear Mr. Rolph: I am in receipt of your communication of April 12th, with report of Grand Jury enclosed. You ask my advice in regard to what action you should take in the matter of the recommendation contained in said report.

The recommendation of a Grand Jury should be given great consideration by any public official, not only by reason of the fact that it is the only inquisitorial body recognized by law, but because of the further fact that such body has greater powers and opportunities in the matter of investigation of public officers than has any single official.

It is unfortunate that you have been denied access to the testimony upon which this body bases its recommendation, for without such testimony it is impossible to judge of the soundness of its conclusions. You have open to you the privilege of citing before you any appointive official of the City and County of San Francisco to meet such charges concerning his competency or integrity as you may see fit to prefer. Such official must have a reasonable time within which to appear and make a showing in his own behalf. If after such investigation you are satisfied of the truth of the charges which you prefer you have the power of removal.

You are not bound to act upon the report of the Grand Jury except in so far as you feel its recommendation to be entitled to consideration at your hands. If the Grand Jury had itself taken some definite action its position would be much stronger. Your action is a matter of policy for you to determine, and as to such action I cannot advise except in so far as there may be questions of law involved.

Respectfully,

PERCY V. LONG,
City Attorney.

Mayor.

**Dover Street, is Wholly Included in 100 Vara Lot No. 145
and is in Private Ownership.**

April 17th, 1912.

Gentlemen: This office is in receipt of your communication in which you ask to be advised whether or not Dover Street from Brannan Street (between First and Second Streets) to a point 275 feet northwesterly therefrom is an open public street.

An adequate answer to your request involves, as will be perceived from this opinion, so extended an investigation as to data which was destroyed by the Fire that delay in replying to your inquiry was unavoidable.

Dover Street, formerly John Street or cul-de-sac, is shown in the Hicks-Judd Block Book as an alley or cul-de-sac 20 feet wide by 275 feet deep and is wholly carved out of 100 Vara Lot No. 145 on the westerly side thereof. It opens into Brannan Street between First and Second Streets.

1. This street or alley does not appear on the Eddy Map of 1851 or on the Humphrey Atlas of 1876.

2. It does not appear on the purported copies printed by Britton & Rey, of the Humphrey Map of 1870, the official map of the City.

3. It does not appear on the purported copy of the Humphrey Map of 1878, printed by Britton & Rey.

4. It is not put down in the list of open public streets of this City and County in the official street book thereof though it is noted therein on pages 7 and 21 that the name of this street, in the year 1882, by order No. 1684 of the Board of Supervisors, was changed from John Street to Dover Street.

5. An alley or cul-de-sac does appear here on the photographic copies made in 1902 of the original Tilton Map made in 1899.

6. An alley or cul-de-sac does appear here on the Manson Map of 1910.

7. On some old maps (not official) an alley or cul-de-sac is shown here.

I caused to be examined in Sacramento, and a photographic copy made of, Order No. 1684. This order, passed in July in 1882, and filling five columns of the Daily Report, recites that it is made to give names to nameless streets, alleys, etc., and to change names of streets, alleys, etc., which appear to be duplicated, in order to avoid confusion to the Postal Department and to citizens generally. Among numerous changes it changes the name of John Street to Dover Street.

By Section 4 of said Order the City Surveyor is directed to place upon the official map the names substituted in this

Order. The Assessor is likewise requested to note the same upon the Block Books and Assessment Map of the City.

The change of name of this street or alley or cul-de-sac by the Board of Supervisors is of no particular significance in determining the question whether the same is public or private. The names of private alleys may be changed by such an order as well as public streets or alleys.

The direction to the City and County Surveyor to place upon the official map the names substituted in a blanket order such as this, is of no great moment in determining the character of a lane or cul-de-sac, that is to say whether it is public or private. Nor is a similar request to the Assessor.

I have before me an abstract, (furnished by Mr. Harry T. Creswell) of the title to 100 Vara Lot No. 145, made by C. V. Gillespie, dated January 18th, 1860, continued to May 1st, 1878.

The following recitals in said abstract are of interest and importance in determining whether John Street or Dover Street, so called, is a public or private alley or cul-de-sac. On page 5 thereof—The City of San Francisco, by William Green, President of the Board of Aldermen, conveyed on December 25th, 1850, to John W. Geary, et al., the Commissioners of the Sinking Fund of San Francisco, 100 Vara Lot 145 (and other property) to said Commissioners in trust for certain purposes—Recorded Liber I of Deeds of Trust, page 109.

On page 6—The same property, on May 31st, 1851, was conveyed by the Commissioners of the Sinking Fund to Peabody E. Morse, James King of William, et al, Commissioners of the Funded Debt of San Francisco, in trust for certain purposes and with power to sell.

On page 9 thereof—The Commissioners of the Funded Debt of San Francisco, on Sept. 17th, 1852, a consideration \$2100, by deed of grant bargain and sale, conveyed 100 Vara Lot No. 145 to Joseph C. Palmer, Edward Jones and Franklin C. Gray, Recorder in Liber I Deeds of Trust, page 203.

On page 59 thereof—A second conveyance of 100 Vara Lot No. 145, 100 Varas x 100 Varas, by Commissioners of the Funded Debt of San Francisco to Joseph C. Palmer, Edward Jones and the legal representatives of Franklin C. Gray, deceased, dated June 1856—Recorded June 30th, 1856, Liber 61 of Deeds, page 428. (This deed is given to confirm preceding deed.)

On page 18 thereof—The California Land Commissioners on Nov. 7th, 1851, conveyed to Joseph C. Palmer and Cornelius I. Eaton, 100 Vara Lot No. 145, 275 feet x 275 feet—Recorded Liber 44 of Deeds, page 605.

It thus appears from this abstract of Gillespie's that both the City and State have sold and conveyed to private ownership all title, interest and claim to 100 Vara Lot No. 145, 275 feet x 275 feet. If then the public own this alley it must be by dedication thereof as a public alley by the owners of the soil.

On page 72 thereof, upon foreclosure of a mortgage held by Nicholas Luning, deed from Charles Doane, sheriff, etc., to William A. Dana, dated March 26th, 1859, Recorded April 1st, 1859, in Liber 89 of Deeds, page 206, conveys (according to "Plot No. 4" on page 75 of said Gillespie Abstract) 275 feet on westerly line of First Street x 245 feet westerly on Brannan Street, "Comprising the lots marked (1), (2), (3), "(4) on said Plot No. 4 hereunto attached and made a part "of this deed, **also** the East half of Ecker Street in said City, "being a strip of land 30 x 275 feet adjoining the said lots "marked 3 and 4 on said Plot No. 4 Easterly **to be sold and "deeded to the City** for a part of Ecker St."

The above conveyance to William A. Dana conveys the whole of 100 Vara Lot No. 145.

This street (Ecker Street) does not any where appear in the deeds or transfers named in said abstract to be thereafter alluded to or recognized. Nor does said 100 Vara Lot No. 145 appear anywhere in said abstract to have been thereafter sold in sub-divisions or with any reference to the above, or any subdivisions. Nor does any sale or transfer to the

City of said Ecker Street or the easterly one-half thereof anywhere appear in said abstract or continuations thereof.

On page 81 thereof—Deed (Q. C.) William A. Dana to Squire P. Dewey, dated: March 2nd, 1860, recorded March 3rd, 1860 in Liber 102 Deeds, page 434, Consideration \$3500. 100 Vara Lot No. 145. 275 feet x 275 feet.

The following additional conveyances and recitals in the Gillespie Abstract may prove of interest and value.

On page 84 thereof—In a deed of G. B. & S. from Stephen Thorne to Richard Roman, dated: January 13th, 1860, recorded Nov. 19th, 1860, in Liber 117 of Deeds, page 548, 100 Vara Lot No. 145. 275 feet x 275 feet. Said lot is described as “all that lot of land covered with water.”

On page 98 thereof—in a deed dated July 24th, 1861, recorded Liber 137 Deeds, page 32, from Horace P. Janes to Delos Lake—Delos Lake became the purchaser of an undivided one-fourth part of 100 Vara Lot No. 145—275 feet x 275 feet.

On page 106 thereof—In a deed dated April 26th, 1864, recorded Liber 246 of Deeds, page 224, from Charles B. Polhemus, administrator of Horace P. Janes, deceased, to Samuel M. Wilson, said Wilson became the purchaser of an undivided one-half interest in 100 Vara Lot No. 145, consideration \$5272.50.

On pages 81, 82 and 85 thereof, by various deeds executed in 1860, Squire P. Dewey seems to have become, along with Horace P. Janes, the holder of the title to this property.

On page 107 thereof—In a deed from Samuel M. Wilson to Squire P. Dewey, dated May 7th, 1864, recorded Liber 246 of Deeds page 228, said Wilson conveyed all his right, title and interest in said lot to Squire P. Dewey.

Immediately after this entry in the abstract on page 107 thereof, Sidney V. Smith says: “I think the title as shown by foregoing abstract to be in Mr. S. P. Dewey, is good.”

(Signed) Sidney V. Smith.

This abstract also shows, on pages 107, 108 and 109 thereof conveyances, dated Dec. 29th, 1866, by Squire P. Dewey to William P. Dewey and Eugene E. Dewey (his sons) of an undivided one-half interest to each in 100 Vara Lot No. 145, 275 x 275 feet. Recorded 468 of Deeds, pages 389 and 472 of Deeds, page 236.

A continuation of this abstract, made by the Title Insurance and Guaranty Co., and extending down to Feb. 27th, 1912, is also in my possession, and shows among other matters the following, on page 7 thereof:

William P. Dewey and Eugene E. Dewey, by G. B. & S. Deed on August 17th, 1883, consideration \$115,000, conveyed the whole of 100 Vara Lot No. 145, 275 feet x 275 feet to Maria Coleman. Deed recorded Aug. 22nd, 1883, in Liber 1087 of Deeds, page 204.

On page 43 thereof—In a Decree of Distribution of the estate of Maria Coleman, deceased, dated Feb. 7th, 1894, Judge J. V. Coffey distributed the whole of 100 Vara Lot No. 145, 275 feet x 275 feet as follows:

One undivided one-third to James V. Coleman.

One undivided on-third to Cecelia C. May.

One undivided one-third to Isabella C. May.

Certified copy of Decree or Distribution Recorded Feb. 8th, 1894 in Liber 1596 of Deeds, Page 344.

On page 114 of C. V. Gillespie Abstract, I find the following: Taxes:

1864-65 to 1869-70.

Paid—1870-71 to 1877-78.

Paid—Part of Lot N. W. Brannan 255—S. W. 1st Street S. W. 20xN. W. 275 feet.

Not assessed being known as "John Street."

Note. A street assessment for replanking Brannan Street, from First to Second Street for \$73.58. This assessment is against John Street.

Warrant issued Dec. 29th, 73.

Warrant returned and recorder Jan. 6th, 74.

\$73.58.

It appears from these abstracts:

1. With the exception of the Sheriff's Deed (71-75 Gillespie Abstract) there has been no sub-division of 100 Vara Lot No. 145 at any time. The title to the whole of said lot or an undivided interest therein has been the subject of each conveyance.

2. No maps appear to have been made or recorded (excepting the plot on page 75, Gillespie Abstract) by the owner or owners of 100 Vara Lot No. 145 with any view of selling the same by subdivisions. A sale by subdivision is usually contemplated in a Sheriff's sale for he is, and was, by the decree in the case, directed to sell only so much of the property as will satisfy the judgment. He necessarily, therefore, offers the property in sub-divisions.

3. No map or maps appear to have been made or recorded by the owner or owners delineating or recognizing any street within the limits of 100 Vara Lot No. 145.

4. No deed or conveyance, so far as disclosed by these abstracts shows any recognition of a street or streets within the limits of 100 Vara Lot No. 145, except the Sheriff's deed on page 71, Gillespie's Abstract, and the whole 100 Vara Lot is sold and conveyed by said deed to William A. Dana, including the strip of land 30 feet wide x 275 deep, the westerly portion of 100 Vara Lot No. 145, "to be sold and deeded to the City for a part of Ecker Street." The City did not buy at this sale the said strip, nor does it appear at any subsequent time to have bought the same or any part thereof.

5. No offer of dedication appears to have ever been made of this or any street within the limits of 100 Vara Lot No. 145.

6. Said John Street or alley or cul-de-sac, or Dover St., from the present appearance thereof does not seem to have ever been paved and there is now standing a gate-post (placed there since the fire) at the front of the alley.

7. During all the years from 1851 to 1899 no street or alley or cul-de-sac appears to be delineated on any copies of the official maps of the City within the limits of 100 Vara Lot

No. 145—275 feet x 275 feet which this office has been able to obtain, until the Tilton Map of 1899.

8. The affidavits show that 28 years since there was a fence across this alley, or cul-de-sac, and that it has been regarded and treated by the owner or owners of 100 Vara Lot No. 145 as a private alley.

9. The fact that the Assessor has not assessed John Street for a number of years last past is of itself and standing alone, of no particular moment in determining the title to realty. Nor does the fact that the warrant for \$73.58 for replanking Brannan Street where John Street enters it establish a public street.

Two affidavits have been handed me by the owners of 100 Vara Lot No. 145, one, by Mr. T. J. Schuyler, who certifies that the southwesterly portion of this lot was rented by the Coleman's to the Pacific Mail Steamship Company, including this so-called Dover St., during the years from 1888 to 1893 and that he collected the rents.

The other affidavit is by Mr. Cribben, who states he has been a renter of a portion of 100 Vara Lot No. 145, for 28 years. Among other matters he says that, "In 1885 and for some years following, a fence extended right across this so "called Dover St." Affiant does not state where this fence was with reference to Brannan Street.

He also states: "During all these years I never heard "of any claim being made by the City that this was a street, "and I never heard of any claim from any adjoining owner "or tenant that he was entitled to its use."

He says also: "Originally there was a line of small residences running back 75 feet from Brannan St., and this 20 "foot strip was left as an opening and an entrance to these "houses. It was the only way these people could get in and "out of their homes. My own opinion is that this space was "left open by the owners of this property to give access to "these cottages, and in time it began to appear as some kind "of a street."

What constitutes a dedication of a street, alley or cul-de-sac, by the owner of the soil, is very clearly stated in *Demartini v. San Francisco*, 107 Cal. 410.

The Court there saying, quoting *San Francisco v. Canavan*, 42 Cal. 554,

“To constitute a valid and complete dedication two things “must concur, to-wit: An **intention** by the owner, clearly “indicated by his words or acts, to dedicate the lands to public use, **and an acceptance** by the public of the dedication.”

“Dedication is never to be presumed without evidence of “an unequivocal intention on the part of the owner.”

Citing, *Quinn v. Anderson*, 70 Cal. 456.

Again the Court says in the *Demartini* case, page 410.

“Much stress is also laid upon the fact that, upon the Engineers Map and other official maps of the City, the strip in “dispute appears to have been laid down as a part of St. Charles Street or alley; but this of itself raises no conclusive presumption that the land has become a public street “either by dedication or otherwise. When, as here, the land “was not a part of one of the originally reserved streets, but “came to private ownership under an Alcalde Grant, the “right to take it as a public street depends upon whether it “has been dedicated as such.”

“The whole question as against the owner of the soil is “whether there is sufficient evidence of an intention to dedicate.”

People v. Reed, 81 Cal. 77.

“To constitute a sufficient dedication there must be an “intention to make it.”

City of Monterey v. Malavini 99 Cal. 290.

“Intention of the owner to dedicate must be plainly manifested.”

San Francisco v. Grote 120 Cal. 62.

If people in the neighborhood of this alley or cul-de-sac have right therein, it is in the nature of an easement and not of a public street.

Gilfillan v. Shattuck 142 Cal. 27.

In the above case the Court says:

“A cul-de-sac, such as the one here in question, “is not a “thoroughfare—which is a passage through”—“a passage “from one street or opening to another.”

Citing—“Webster’s Dictionary; Woodyer v. Hadden 5 Taunt 125; Bateman v. Bluck 14 Eng. Law & Eq. 69.”

See Gilfillan v. Shattuck 142 Cal. 32.

“Though not a thoroughfare, clear and satisfactory evidence is required to prove a cul-de-sac a highway. It is strong observation to a jury that the way leads no where.”

Idem.

My conclusion is that the title to the whole of 100 Vara Lot No. 145, including Dover Street or cul-de-sac, which is a part of said 100 Vara Lot, is in private owners and the facts obtainable by me do not warrant me in advising you that Dover Street or alley or cul-de-sac is a public alley, street, or cul-de-sac.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Works.

Storekeeper of Corporation Store Yard holds his Position at Pleasure of Board of Works and is not Subject to Civil Service.

April 18th, 1912.

Gentlemen: I am in receipt of your communication of April 15, 1912, as follows:

“This Board pursuant to the provisions of Section 32, Chapter II, of Article VI, of the Charter by its resolution (No. 17,001, Second Series) duly passed on the 10th day of April, 1912, appointed one M. J. McGovern as Storekeeper for the Corporation Store Yard of the Department of Public Works, at a compensation of one hundred and fifty dollars per month; such appointment to be in force and effect on and after April 12, 1912.

The Civil Service Commission was duly notified of the said appointment so made, and said Commission by communication of date April 12, 1912, notified this Board that it had disapproved said appointment for the reason that it was without the authorization of the Civil Service Commission, and therein further declared its views as to the status of the office of Storekeeper of the Corporation Store Yard as will appear by reference to said communication, a copy of which is herewith transmitted.

You are requested to advise this Board whether or not the Civil Service Commission has correctly construed the provisions of the charter insofar as they relate to the appointment in question.”

Attached to this communication is a copy of a communication received by your Board from the Civil Service Commissioners in which occurs the following:

“With regard to the above mentioned position of storekeeper we desire to state that we considered said position to be that of Storekeeper of the Corporation Store Yard of your Board, and that, notwithstanding the fact that Section 32, Chapter 11, Article VI, of the Charter, states that the appointee to said position shall hold this office during the pleasure of your Board, it is our opinion that said position is subject to Civil Service as it is not mentioned in Section 11 of Article XIII of the Charter as being exempt.

In confirming this you will note that the position of City Engineer, created by Section 11, Chapter I, Article VI, is held by exactly the same tenure but, in order to exempt it from the Civil Service provisions of the Charter, it is speci-

fically exempted in Section 11 of Article XIII. The position of Storekeeper of the Corporation Yard, holding by the same tenure and not being specifically exempted, is therefore held to be a Civil Service position."

Opinion.

The Charter, in Article XIII, dealing with Civil Service, Section 11, reads as follows:

"The provisions of this article shall apply to the following officers and departments of the City and County: * * * the Board of Public Works * * * but the following deputies, clerks and employes in said offices and departments shall be exempted therefrom; * * * the City Engineer, the Secretary and the Architect of the Board of Public Works, * * *

If we had this section only to interpret it would clearly appear that the Storekeeper for the Corporation Store Yard would not be exempted from the Civil Service provisions of the Charter. However, Chapter II, Article VI of the Charter dealing with the Department of Public Works provides in Section 32 thereof that:

"The Supervisors shall select some place in the City and County which shall be known as the Corporation Store Yard, wherein shall be kept all supplies, material, implements and machines belonging to the City and County, to be used in repairing or cleaning and sprinkling the streets or for any improvement thereon. The Board of Public Works shall appoint a Storekeeper for said Yard **who shall hold his office during its pleasure.** * * *

We here have what might appear to be an inconsistency between these different sections, as it would seem that since the Storekeeper holds his office during the pleasure of the Board of Public Works that the Charter framers would have included him, along with the City Engineer, and Architect, as exempt from the operation of the Civil Service sections, in Section 11 of Article XIII. However, in my opinion, it was

not necessary to so exempt the City Engineer, as the Charter had already provided in Article VI, Chapter I, Section 11, that the City Engineer "shall hold his office at the pleasure of the Board." It would seem that the spirit of the Civil Service provisions of the Charter require that one subject to these provisions cannot possibly be removed at the mere pleasure of the appointing board or officer. Section 12 of Article XIII provides:

"No deputy, clerk or employe in the classified Civil Service of the City and County, who shall have been appointed under said rules, (that is the Civil Service rules of the Charter) shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. * * *

It might be claimed that one could be subject to an appointment under the Civil Service Sections and still be subject to removal at the pleasure of the appointing power. However, this, I believe, would not be in accordance with the spirit of the Article on Civil Service, and indeed, I know of no other single instance where said interpretation could possibly be made with reference to any employee of the City. And it would appear to be a strained construction that would permit of such an interpretation in the single case of the Storekeeper, unless there was some apparent reason why the Charter framers should wish to make such an exception in his case.

We are aided in the solution of this question by noting how this language, referring to the holding of an office "during the pleasure of the appointing power" is used in other parts of the Charter. We find, for instance, that in Article IV, Chapter I, dealing with the Mayor's office, it is provided with reference to his secretary and usher and stenographer, "all of said appointees shall hold their positions at the pleasure of the Mayor." And, in Section 5, Chapter II, Article V, dealing with the City Attorney, it is provided that "the assistants, clerks, typewriter and messenger shall be ap-

pointed by the City Attorney, and shall hold their offices at his pleasure. * * * ”

This language then, is used in these two additional cases where the Civil Service provisions do not operate at all, and I am of the opinion that a reasonable construction of the sections with reference to the Storekeeper leads to the conclusion that his position is in no way affected by the Civil Service provisions of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Upon Removal of a Saloon, Permit Cannot be Granted Allowing its Reestablishment Within 150 Feet of any School or Church.

April 18th, 1912.

Gentlemen: I am in receipt of your communication of the 12th inst. as follows:

“Section 6 of Ordinance No. 1038 (New Series) reads as follows:

‘Section 6. No permit shall be granted to conduct any newly established place or saloon where liquor is sold to be consumed upon the premises, when the same is located within 150 feet of any church or school.’

We would like to be advised as to whether or not a person who **has been conducting a retail liquor business within 150 feet of a school** can move his place of business to a new location which is within 150 feet of the said school?”

Opinion.

Section 6 of Ordinance No. 1038 (New Series) does not prohibit the sale of liquor within one hundred and fifty feet of any church or school but it does prohibit the Board of Police

Commissioners from granting any permit to conduct any newly established place or saloon within said limits, the underlying purpose of said section being to prevent any saloons other than those which existed at the time of the adoption of the Ordinance being established within said limits.

It is manifest that the general purpose of the ordinance was to prohibit the business of saloons within one hundred and fifty feet of a school or church, but for obvious reasons it made an exception in favor of parties who were engaged in the business at such prohibited places at the time of the adoption of the ordinance under an existing license. When the ordinance went into effect, there doubtless were cases where parties were engaged in the saloon business within said limits. It was thought to be harsh and unjust to break up their business and drive them away when their licenses expired, and hence the purpose was to except them from its operation.

It may be assumed that there were places within the limit when the ordinance was adopted that had been leased and fitted up at considerable cost for the purpose of conducting the saloon business. In such cases the power to renew licenses from time to time was left with the Board of Police Commissioners, but when the licensee, who was thus established when the law took effect, abandoned the business the prohibition became absolute as to all new applicants. I do not wish to be understood to say that the business must be shown to have been carried on by a person holding the license at the time of the adoption of the ordinance. There must, however, be no appreciable period of time during which the business was not carried on, and the application for a renewal of the license may be made by one who acquires the business from the original licensee, as I advised your Honorable Board on March 10, 1909, in an opinion on that subject.

Continuing to do business then at the sufferance of the legislative body, and having no right which could not be swept away entirely by ordinance, those parties who were engaged in the liquor business at the time of the adoption of the ordinance, enjoyed and are now enjoying a privilege denied to

others who might wish to engage in the business within the specified limits. In order to enjoy that privilege, they must remain at the places where they were established at that time, and cannot be permitted to assume the character of peripatetic saloon keepers.

It would be in direct violation of the ordinance to permit, for example, a saloon keeper who was established at the time of the adoption of the ordinance, at the extreme point of the limitation to transfer his license and his business to a place immediately adjoining a school or church. It might be said that to allow such a transfer would create no worse condition than if the saloon had been established at that point when the ordinance went into effect and, by the terms of the ordinance, allowed to remain, but we must not lose sight of the fact, that, as has been said, he was allowed to continue to do business within the limits only out of a feeling of consideration for his investment.

If any other construction were placed upon the ordinance there would be nothing to prevent the wholesale transfer of licenses within that limitation, possibly to the annoyance and discomfort of those designed by the ordinance to be protected and by this means, destroy both the intent and the language of the ordinance. I entertain not the slightest doubt that the language used in Section 6 is explicit on the proposition that the transfer of a license from one place to another within the limit specified would be to grant a permit to conduct a "newly established place or saloon." It is immaterial that the section does not prohibit, in express terms, the transfer of a license within said limits. It says "no permit shall be granted" and that signifies the highest form of authority of the Police Commissioners. In my opinion the use of the word "granted" includes the word "transferred" and that being so, the prohibition in the section extends to cases of the kind under discussion.

Holding these views, then, you are advised that a person who has been conducting a retail liquor business within one hundred and fifty feet of a school cannot move his place of

business to a new location which is within one hundred and fifty feet of said school.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

**Members of Fire Department Temporarily Disabled While off
Duty Not Entitled to Payment of Salary Pending Such
Disability.**

April 19th, 1912.

Gentlemen: I am in receipt of your communication where-
in you request an opinion on the following:

Does my opinion of August 1, 1909, apply "to case of physical disability occasioned by accidents not incurred in the discharge of duty, and to accidents incurred when off duty, or only to sickness of members of this department, and, in particular, if Section 3, Chapter II, Article IX, by implication would prohibit the payment of salary to an officer, member or employee who shall become temporarily disabled by reason of an injury which was not received in the discharge of duty?"

Section 3 of Chapter II, Article IX of the Charter provides that:

"When an officer, member or employee of the Department shall *become temporarily disabled* by reason of injuries received in the actual performance of his duty therein so as to incapacitate him from performing his duty, the Commissioners shall allow his salary during the continuance of such temporary disability."

My predecessor, Mr. Franklin K. Lane, has interpreted this section as follows:

"This of course, does not mean that when a member of the department is injured in doing something other than that which his duties require of him, he shall be allowed his salary during his term of disability, but it does mean I take it, that

if a man is injured while in the performance of any duty required of him by the rules of the department, whether such injury is received in the extinguishing of fires, or in his quarters, the city shall allow his salary during the continuance of such term of disability. The words "injuries received" do not include diseases contracted unless such disease follow as an immediate consequence of some injuries received, and the incapacity which must result from the injury in order to entitle him to his salary must be such as to render him incapable of competently performing the duty which the law and the rules of your department require from a man in his position."

Opinions of Franklin K. Lane,

1899-1902, p. 621.

With reference to my opinion of August 1, 1909, I there had to consider a case where a fireman was suffering from an ordinary sickness, and there was no question of physical injuries received through accident. There is nothing in the Charter covering such a case, and I am still of the opinion that a fireman so incapacitated from active duty by sickness should not be deprived of his salary.

But your present inquiry presents the same situation that was before City Attorney Lane in his opinion above cited. In the case submitted by you for an opinion, the petitioner himself states: "I was injured *while at home on my day off* by receiving a cut on the right hand which necessitated an absence from duty during the above stated time."

Applying to this statement of facts the interpretation of the Charter section by Mr. Lane above mentioned, which interpretation I approve of, the necessary conclusion is, that such an accident, under such circumstances, does not permit the payment of salary to an officer, member or employee of the Fire Department who shall become temporarily disabled by reason of any injury which was received when off duty, and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Sufficiency of Specifications for Lease of School Lot on
Washington Street.

April 23rd, 1912.

Gentlemen: I am in receipt of your communication of the 19th inst., in reference to the matter of advertising for lease of school lot on Washington Street between Franklin and Gough Streets. I have carefully examined the specifications in reference thereto and find the same sufficient without any change or alteration except that in the next to the last paragraph you specify that the bidder will have ten days to enter into and sign the required lease after the award is made. That requirement is open to the same objection that I found in the specifications about to be adopted by your Honorable Board in the matter of the lease of the school lot on the North side of Golden Gate Avenue West of Leavenworth Street. I find that on December 14, 1911, I advised your Honorable Board in reference to the said specifications for the lease of the Golden Gate Avenue lot. I herewith enclose a copy of said opinion which will answer all the questions propounded in your letter of inquiry of the 19th inst.

I find also that the specifications in the Golden Gate Avenue lot matter are identical with the specifications proposed for the lease of the Washington Street lot and as hereinabove pointed out the Washington Street lot specifications are open to the same objection, that they call for a ten day limit in which to enter into the lease instead of five days, as provided for in the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

Board of Education has Power to Allow Teachers One-Half Salary for not Exceeding 2 Months During Absence Caused by Grave Illness.

April 29th, 1912.

Gentlemen: I am in receipt of your communication asking me to advise you as to your power "to allow compensation to teachers during absence, in accordance with the terms of the following resolution:

"Resolved: That the Board of Education may, in its discretion allow teachers one-half salary for a period not exceeding two months, during absence caused by grave illness requiring medical or surgical attention."

Section 1616 of the Political Code of the State provides that "Boards of Education are elected in cities under the provisions of the laws governing such cities and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided."

The Charter, by Article VII, Chapter III, Sec. I, gives the Board of Education, in addition to the powers conferred by the general laws of the State, and other sections of the Charter, the power

"1. To employ such teachers and persons as may be necessary to carry into effect its power and duties; to fix, alter and approve their salaries and compensation, and to withhold for good and sufficient cause the whole or any part of the wages, salary or compensation of any person or persons employed as aforesaid."

"4. To establish and enforce all necessary rules and regulations for the government and efficiency of the schools and for carrying into effect the school system;"

In accordance with this Charter section, and to carry out its provisions, your Board promulgated a set of rules and regulations, among which are the following:

Sec. 31. (7) (Principals.)

"Fines for tardiness and deduction from salary for absence will be made according to the salary schedule of each year."

Sec. 89. (Teachers).

"A deduction of one-thirtieth of a month's salary shall be made for each day's absence, and one-sixth of this amount for each hour's absence, unless the absence be in accordance with the section which permits teachers to visit schools, or by permission of the Board."

Under the above quoted charter section, your Board may * * * "withhold for good and sufficient cause the whole or any part of the wages, salary or compensation" of a teacher. Such rules have been held reasonable in the case of *Stuart v. Board of Education*, 118 Pac. Rep. 712.

With such a large corps of persons the Board seems to have deemed it a reasonable precaution, in order to prevent unnecessary and unavoidable absences and tardiness, to deduct a certain amount from the monthly salary of a teacher for absence or tardiness. Its right to do this has never been, nor is it now, questioned, and is but adopting a wise business method in municipal affairs.

Rule 89 states that the deduction of salary shall be made "unless the absence be * * * by permission of the Board." The proposed resolution states that the salary may be allowed by the Board "in its discretion," or, in other words, "by permission of the Board." The resolution would then be valid under and by virtue of this clause, permission being given in each case by the Board. That is, the Board by allowing the salary would in effect retroactively grant the leave to be absent upon the condition of receiving one-half the salary under the terms of the proposed rule. If in the opinion of your Board, it is for the best interests of the department to adopt such a resolution as tending to protect the welfare and increase the efficiency of this important branch of our municipi-

pal government, I am of the opinion that this would be a lawful exercise of the powers in you vested.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

**Demand for \$1900 for Rent of Temporary City Hall Having
Been Approved by Mayor and Supervisors Should be
Audited.**

April 29th, 1912.

Sir: I am in receipt of your request for an opinion under date of April 26, 1912, which reads as follows:

“Demand for \$1,900.00, payable to the Whitcomb Estate by James Otis, Trustee, for rent for the month of March, 1912, of the premises known as No. 1217 to 1245 Market Street, occupied by the Tax Collector, County Clerk, Assessor, Board of Supervisors, Board of Fire Commissioners, Mayor’s office and the City Attorney, has been approved by Supervisor Paul Bancroft, Chairman of the Committee on Public Buildings, William McCarthy and D. Murphy of the Finance Committee; also by his Honor, James Rolph, Jr., Mayor; and my object in writing to you is to have you advise me as to whether I should audit same.”

Although you do not state in your request, I understand from the Clerk of the Board of Supervisors that the demand referred to in your opinion was approved by resolution of the Board of Supervisors in addition to the approval of the Finance Committee of the Board of Supervisors and the Mayor.

Under these conditions I advise you that the same should be audited.

Respectfully,

PERCY V. LONG,
City Attorney.

Auditor.

**Ordinance No. 1651 is Constitutional and Valid and Does Not
Conflict With State Revenue Laws.**

April 29th, 1912.

Sir: I am in receipt of your communication which reads as follows:

“Referring to Ordinance No. 1651 which concerns tunnel construction, I beg to inquire if the last paragraph of Section 17 of said ordinance conflicts with the revenue laws of the State.”

I have examined Section 17 and I see nothing in that section which has anything to do whatsoever with the revenue laws of the State.

Section 17 merely provides that any property owner whose property is assessed may sign an agreement, the form of which is set forth in the Section, by which the property owner agrees to pay his assessment in equal installments covering a period of ten years. Upon signing such an agreement the property owner is permitted, under the ordinance, to pay his assessment in equal installments as agreed to by him in said agreement.

The last paragraph of Section 17 provides that the Tax Collector is authorized and directed to make any sale provided for in such agreement, and also that if it is made to appear that the agreement was not executed by the owner of the property or for any reason was invalid or that a sale in accordance with its terms would not convey a full and clear title to the property described in the agreement the Tax Collector shall forthwith sell the property.

In the case of *Mardis v. McCarthy*, recently decided by the Supreme Court, Ordinance 1651 was held to be a valid ordinance. That necessarily implies the validity of these agreements because these agreements are essential and a necessary part of the whole scheme of the ordinance. In view of that decision I know of no reason for doubting the validity of Section 17 and know of no useful purpose that can be served by attacking its validity.

The ordinance is designed to permit the construction of tunnels in San Francisco which cannot be constructed under the machinery of our Charter provisions for local improvements and was enacted by the Board of Supervisors in accordance with the desires of the citizens of San Francisco.

In the face of the decision in *Mardis v. McCarthy* I can take no position other than that the ordinance is constitutional and valid.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Attention of J. O. Low.

**Sears Street 42 Feet in Width and Board of Supervisors has
Power to Ratify Map Approved by Board of Works.**

April 30th, 1912.

Gentlemen: I am in receipt of your communication of the 20th inst., as follows:

"I am directed by the Committee on Streets and Sewers to request your opinion on the following matters relating to Sears Street:

What is the status of property rights fronting on Sears Street between Lawrence Avenue (formerly Sherman Avenue) and Sickles Avenue?

What is the official width of Sears Street between Lawrence and Sickles Avenues?"

Opinion.

On October 17, 1911, in an opinion rendered by me to the Board of Public Works I advised said Board that the Board of Supervisors was vested with power to ratify and confirm the map prepared by the City Engineer relating to the lines

of Sears Street between Sickles and Sherman Avenues in West End Map No. 2, after the same had been approved by Resolution of the Board of Public Works. In that opinion I expressed no opinion as to the width of Sears Street. The records of the Board of Public Works show that on the 20th day of March, 1912, the said Board of Public Works by Resolution No. 16,611 (Second Series) approved Map of Block No. 9 of West End No. 2 of the City and County of San Francisco, showing the position of street monuments, subdivision lines and monument lines prepared by direction of the Board of Supervisors under Resolution No. 18,671 (New Series) February 15, 1886.

The history relating to Sears Street, as I gather it from the report of the City Engineer, Marsden Manson, given to the Board of Public Works on September 5, 1911, is as follows; that on February 15, 1886, the Board of Supervisors adopted the following resolution:

“RESOLVED, That the City and County Surveyor be and is hereby directed to make the necessary surveys and report to this Board a proper system of grade to be established on and about the vicinity of Blocks Nos. 6, 9 and 20, West End Map No. 2, in this City and County; also to furnish and place the necessary monuments when the grades so reported by him shall have been established by this Board, provided that all expense of said survey report and the placing of monument shall be borne by Messrs. G. Greenwood, Wm. M. De Wolf and other parties interested in the establishing of said grade, and that no expense shall be entailed upon the city for said survey, report or monuments.

And the Clerk is hereby directed to advertise this resolution as required by law.

In Board of Supervisors, San Francisco, February 15, 1886.

Adopted by the following vote:

Ayes—Supervisors Gates, Roy, Kunkler, Abbott, Farwell, Pond, Williamson, Farnsworth, Gilleran, McMillan, Valleau.

JNO. A. RUSSELL, Clerk.”

On March 1, 1886, Charles S. Tilton, City and County Surveyor filed said map with the Board of Supervisors with the accompanying letter:

“To the Honorable,
The Board of Supervisors.

Gentlemen: In compliance with Resolution No. 18,671 (New Series) of your Honorable Body, bearing date of Feb. 15th, 1886, the Survey has been made and the monuments placed as fully designated and shown on the accompanying Map.

Yours respectfully,

(Signed) CHAS. S. TILTON,
City and County Surveyor.”

Since that date, March 1, 1886, to the present time the map prepared by Mr. Tilton has been generally recognized as the true and correct map of Block No. 9 West End Map No. 2; that those who own property fronting on Sears Street always recognized Sears Street to be forty-two feet in width and have built their improvements accordingly; that the City officials have recognized Sears Street to be forty-two feet in width and not sixty, as is contended for by the petitioner in this matter who desires to have the obstructions removed therefrom. The records of the Board of Supervisors as far as obtainable do not disclose that any action was taken by that body to confirm and ratify the map and survey as made by Mr. Tilton. However, it was in their power to do so and the mere lapse of time between March 1, 1886 to the present time does not divest said Board of jurisdiction to ratify and confirm said map.

In view of the fact that said map and survey were made in accordance with resolution of the Board of Supervisors by the then City and County Surveyor; that all improvements since that time have been made according to the lines laid down on said map and that nothing appears of record showing that a width of sixty feet on Sears Street was ever established by the municipal authorities, you are advised that Sears Street at the present time is forty-two feet in width and that your

Honorable Body has jurisdiction and complete power and authority to ratify the map prepared by the City Engineer and approved by the Board of Public Works relating to the lines of Sears Street in Block No. 9 West End Map No. 2.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Board of Election Commissioners May Group Items in Inviting Proposals for Bids so as to Promote Certainty and Security in Procuring Printing.

April 30th, 1912.

Gentlemen: I am in receipt of your communication of the 15th inst., enclosing a resolution of the Board of Election Commissioners adopted on that day, which reads as follows:

“RESOLVED, That the opinion of the City and County Attorney be requested forthwith for the Department of Elections upon the question as to whether the Department of Elections in inviting proposals and bids for contracts under Section 1079 of the Political Code is obliged or bound to provide that any bidder may bid separately for any article named or whether the Board in making contracts under Section No. 1079 may, if, in its judgment it deems that greater security in securing printing of materials of the kind and at the time which may be required to a certainty, which cannot hinder or delay an election, will be secured by inviting proposals and letting contracts for various items in the aggregate to the lowest responsible bidder for such aggregate, so group the items in aggregate bids as will best serve the purpose of said Election Department by way of security and certainty as aforesaid, according to the judgment of said Board.”

This question, in practically the same form, was answered by my predecessor, Mr. Wm. T. Burke, in an opinion rendered

your Board April 19, 1907, which opinion is on file in the records of the Board, and to which you are referred.

Mr. Franklin K. Lane has also defined the powers of the Board of Election Commissioners in this respect at page 135 of his "Opinions." Further, at page 689 of his "Opinions," in reply to the query as to "what departments of the municipality have the right to independently order non-contract goods or supplies—that is, without bids having been received by the Board of Supervisors and contracts awarded," Mr. Lane included the Board of Election Commissioners.

The case of *City and County of San Francisco v. Broderick*, 111 Cal. 302, cited by Mr. Burke in the opinion above cited has not been overruled, and remains the law upon the subject at this time.

Since, therefore, these opinions, which have my approval, hold that the Election Department is excepted from the provisions of Sec. 3, Chapter III of Article II of the Charter, it is subject, according to Sec. 5 of Chapter I, Article XI of the Charter, to the general laws of the State. The State law in reference to this subject is found in Sec. 1079 of the Political Code.

The Legislature, realizing that time is often of prime importance in the management of elections, amended this section in 1907, so as to obviate the need of proposals and bids, when the Board deems it of sufficient importance to warrant the suspension of such procedure.

Examining the internal evidence of Sec. 1079 of the Political Code as to the method of bidding, the word "aggregate" is used, and the Board of Election Commissioners are directed "to invite proposals" and "to let the contract for the same to the lowest responsible bidder therefor." The use of the singular "contract," and "bidder" together with the word "aggregate," presuppose the letting of *one* contract, for the whole, to *one* bidder.

In view of the above, you are advised that your Board is not "obliged or bound to provide that any bidder may bid separately," and that it may "so group the various items in

aggregate bids" so as to best serve the purpose of the Department in the way of security and certainty, according to the judgment of the Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Location of Saloon—San Francisco Business College is a School within the meaning of Sec. 6 of Ordinance 1038 (N. S.), and is within 150 feet of premises at S. E. corner of Market and Fifth Streets.

May 1st, 1912.

Dear Sir: I am in receipt of your communication of the 27th instant as follows:

"It has come to my knowledge, as the Mayor of the City and County of San Francisco, that the Board of Police Commissioners, on Thursday, the 25th day of April, 1912, granted a license for the sale of spirituous liquors in quantities of less than one quart, to be consumed on the premises at the south-east corner of Fifth and Market Streets, to one Frank Corr.

Representations were made to me that the said premises were within one hundred and fifty feet of the "San Francisco Business College," located in the building which has its entrance at No. 908 Market Street, and that said license was granted in violation of the provisions of Section VI of Ordinance No. 1038. The San Francisco Business College is located on the third floor of said building, and is a school conducted for the purpose of imparting knowledge to pupils in stenography, shorthand, typewriting, etc., and is attended by about one hundred pupils in the daytime, and by about the same number at night.

I desire to be informed whether said business college comes within the purview of Section VI of Ordinance 1038,

and, if so, whether the same is within the limit prescribed by said section, to wit: one hundred and fifty feet from the premises to be occupied by said Corr, at the southeast corner of Market and Fifth Streets.

I transmit, for your information, record of proceedings of the Board of Police Commissioners of this City and County, in reference to the application for a license at said place."

Opinion.

Section VI of Ordinance No. 1038 (New Series), adopted by the people at a municipal election held November 2, 1909, is as follows:

Section VI. No permit shall be granted to conduct any newly established place or saloon where liquor is sold to be consumed upon the premises, when the same is located within one hundred and fifty feet of any church or school.

In an opinion rendered by me on the 18th instant to the Board of Police Commissioners, in connection with the transfer of a liquor license, I advised said Board as follows:

"Section VI of Ordinance No. 1038 (New Series) does not prohibit the sale of liquor within one hundred and fifty feet of any church or school, but it does prohibit the Board of Police Commissioners from granting any permit to conduct any newly established place or saloon within said limits, the underlying purpose of said section being to prevent any saloons other than those which existed at the time of the adoption of the ordinance being established within said limits.

It is manifest that the general purpose of the ordinance was to prohibit the business of saloons within one hundred and fifty feet of a school or church, but for obvious reasons it made an exception in favor of parties who were engaged in the business at such prohibited places at the time of the adoption of the ordinance under an existing license. When the ordinance went into effect, there doubtless were cases where parties were engaged in the saloon business within said

limits. It was thought to be harsh and unjust to break up their business and drive them away when their licenses expired, and hence the purpose was to except them from its operation.

* * *

It would be in direct violation of the ordinance to permit, for example, a saloon keeper who was established at the time of the adoption of the ordinance, at the extreme point of the limitation to transfer his license and his business to a place immediately adjoining a school or church. It might be said that to allow such a transfer would create no worse condition than if the saloon were established at that point when the ordinance went into effect and, by the terms of the ordinance, allowed to remain, but we must not lose sight of the fact that, as has been said, he was allowed to continue to do business within the limits only out of a feeling of consideration for his investment.

If any other construction were placed upon the ordinance there would be nothing to prevent the wholesale transfer of licenses within that limitation, possibly to the annoyance and discomfort of those designed by the ordinance to be protected and by this means, destroy both the intent and the language of the ordinance. I entertain not the slightest doubt that the language used in Section VI is explicit on the proposition that the transfer of a license from one place to another within the limit specified would be to grant a permit to conduct a 'newly established place or saloon.' It is immaterial that the section does not prohibit, in express terms, the transfer of a license within said limits. It says 'no permit shall be granted' and that signifies the highest form of authority of the Police Commissioners. In my opinion the use of the word 'granted' includes the word 'transferred' and that being so, the prohibition in the section extends to cases of the kind under discussion.

Holding these views, then, you are advised that a person who has been conducting a retail liquor business within one hundred and fifty feet of a school cannot move his place of

business to a new location which is within one hundred and fifty feet of said school."

Section VI prohibits, of course, the transfer of a license from any place without the prohibited distance of one hundred and fifty feet from any school or church to any point within said prohibited distance.

In the case under discussion an application was made by one Frank Corr to purchase the license of Michael W. Silk, on the corner of Beale and Market Streets, and transfer said license to the premises on the southeast corner of Fifth and Market Streets.

It is a matter of common knowledge that said premises have been occupied by the City and County Bank and have since the removal of said bank been vacant. Thus, the granting of a liquor license at that particular place would be granting a license for a **newly** established place of business for the sale of liquor in quantities less than one quart.

In the minutes of the Board of Police Commissioners, meeting of said Commission held on February 8th, 1912, record book No. 16, at page 326, the following resolution adopted by the said Board appears:

"Saloon permits on Market and other Streets.

Resolved, That on and after this date this Board will grant no further permits to conduct saloons, except hotel bars, on Market Street from East to Castro Streets, on Kearny Street from Market to Broadway; on Haight Street from Gough to Stanyan Streets, on the Great Highway, on Third and Fourth Streets from Market to Channel Streets, on Marshall Square and on Grant Avenue from Market to Bush Street.

Adopted by the following vote:

Ayes: Commissioners Woods, Spiro, Cooke.

No. Commissioner O'Grady.

The above resolution, so far as I can discover, has never been amended or repealed by the Board of Police Commissioners.

It is contended that the San Francisco Business College is located within one hundred and fifty feet from the southeast corner of Market and Fifth Streets, and for that reason under the ordinance, and the Board of Police Commissioners was without power to grant the said license.

Two questions present themselves for determination:

First: Whether or not the San Francisco Business College, located in the building having its main entrance at 908 Market Street, is a school within the purview of Section VI of Ordinance No. 1038 (New Series).

Second. Whether the said business college is located within the distance inhibited by said Section VI of the ordinance, to-wit: one hundred and fifty feet.

The word "school" is defined by Webster, in his dictionary issued in 1907, as follows:

"An assemblage of scholars; those who attend upon instruction in a school of any kind; a body of pupils."

It is defined in the case of *American Asylum of Deaf and Dumb vs. Phoenix Bank*, 4 Conn. 172, 177, 10 Am. Dec. 112, as follows:

"'School' is a generic term and denotes an institution for instruction or education."

The Court, in *re Sanders*, 36 Pac. 348, 349, 53 Kan. 191, 23 L. R. A. 603, defines the word "school" as follows:

"A school is an institution for learning; an educational establishment; an assemblage of scholars; those who attend upon the instruction in a school of any kind; any place or means of discipline, improvement or instruction."

Commonwealth vs. Banks, 48 Atl. 277, 278, 198 Pa. 397, defines the word "school" as follows:

"The word 'school' is applied to institutions which are confined to some special grades of instruction. This word 'school' has become a common dictionary word, which may be appropriated by any person."

State vs. Leighton, 35 Me. 195:

“A private school giving instruction in writing is a ‘school’ within a statute against disturbing schools”.

In the case of Omaha Medical College vs. Brush, reported in 35 N. W., at page 222, the Court said:

“We can see no good reason for limiting the meaning of the word ‘school’. An examination of any work in which the subject is fully discussed, will show that the word in its broad sense is applied to any institution of learning; and it evidently is used in that sense in the statute. The exemption, therefore, applies to any institution of learning used exclusively for school purposes. The exemption is expressly declared in the statute and should not of course without good reason limit or restrict the right.”

The Court, in that case, held that the Omaha Medical College, a corporation duly incorporated under the laws of the State of Nebraska, for the purpose of organizing a school for the teaching of the sciences of medicine and surgery, was a school.

In the case of People ex rel Clausen vs. Murray et al, reported in 38th New York Supplement, pages 609 et seq., involving a statute, which provided that “no person * * * shall be licensed to sell strong or spirituous liquors, etc., in any building * * * which may be on the same street or avenue and within 200 feet of a building occupied **exclusively** as a school house, the distance to be ascertained by measurement from the center of the entrance of said building to the center of the entrance of such place for which the license is solicited.” The Court held that a school maintained by the Christian Brotherhood was a school within the purview of the statute.

In the case of in re Lyman, 62 New York Supplement, page 846, the Court held that St. Monica’s School was a school within the meaning of a statute which prohibited the traffic in liquors in any building on the same street or avenue and

within 200 feet of a building occupied exclusively as a church or a school house.

In the case of *People ex rel Cairns vs. Murray et al.*, reported in 42 North Eastern Reporter, at page 584, the question of whether a parochial school maintained by the Sisters of Charity was a school within the terms of the statute. The Court held that a parochial school was such.

The case in *re Townsend*, 88 North Eastern, page 41; 22 L. R. A., page 194, held that a building maintained as a hospital and as a training school for nurses, which is registered with the State Board of Regents, and admits as pupils only women of at least 23 years of age, is not within the meaning of a statute forbidding the sale of intoxicating liquors within 200 feet of a building occupied exclusively as a school house.

The Court defines a school as follows:

“ ‘School’ in its broadest sense may be said to include any institution devoted to instruction of any kind and in the same broad sense may be said to include any institution of any kind; and in the same broad sense a ‘school house’ may be defined as a place or building used for any such purpose, but there are a great variety of so-called schools devoted to many special sciences and trades. There are schools for education in the professions of law, medicine and theology; schools for painting, music and other advanced arts; schools for stenography and typewriting; schools for dancing, gymnastics, physical culture and boxing; and schools for almost numberless other more or less practical occupations. Many, if not all, of these special courses, are taken up by persons of mature years who have passed through the earlier educational training which is the essential preliminary of every avocation or vocation requiring intelligence, thought or talent. All are instructed to a degree, but none are within the usual accepted definition of education. Much less can they be within the purview of a particular statute unless they are plainly specified in these terms and still are they to be considered within the definition of ‘schools’ and ‘school houses’ as those words are ordinarily understood.”

The expression of the Court in reference to the different kinds of schools was not necessary in the determination of the question before the Court, and for that reason is obiter dictum and not controlling here. It may very well be that a training school for nurses is not a school within the purview of the statute under consideration in that case.

Section 6 of Ordinance No. 1038, prohibits the granting of a license within a distance of one hundred and fifty feet from **any** school or church. The word "any" has been held to mean "every".

In the City of Savannah vs. Solomon Lodge, 53 Ga. 93, the Court uses the following language:

"Section 798 exempting from taxation all poorhouses, almshouses, houses of industry, or any house belonging to any charitable institution 'any' is to be construed as 'every' and as a Masonic lodge is a charitable institution any house, belonging to such a lodge is exempted from taxation."

The operation of the ordinance is not restricted to public schools, which schools are supported by public funds. It includes any and every school, whether public or private, designed for the purpose of imparting education to those who attend it.

In an opinion rendered by me to the Board of Police Commissioners on December 23, 1909, which opinion can be found in the published opinions of the City Attorney for the years 1908-09, the question was considered whether a kindergarten, located within one hundred and fifty feet of premises for which an application had been made to sell liquors therein, was a school within the purview of Section 6. Therein I used the following language:

"In addition to the facts stated in your communication I understand that the kindergarten in question is a private kindergarten, supported by private contribution, and that it occupies a single room on the ground floor of a three-story building, the balance of which building is used for dwelling purposes, and in no way connected with the kindergarten,

and the question is whether such a kindergarten is contemplated by Section 6 of Ordinance No. 625 (New Series).***

The word 'school' has been interpreted in several cases, and it is necessary for us to conclude that the Supervisors, in passing the above ordinance, had in mind this interpretation, which has been given to this word in the law. 'School' is universally held to be a generic term.

In *Farrell vs. The State* (32 Atl. 5570), it was held that a writing school, though to continue for the term of twenty days only, is a school within the meaning of the section of the Code prohibiting the sale of liquors to a minor pupil of any 'college, school or academy.'

In *Luthe vs. The Farmer's Mutual, etc.* (55 Wis. 543), a Statute prohibiting a town insurance company from insuring 'school houses' without a majority vote of the members.

It was held that the following state of facts showed the existence of 'school houses' within the Statute:

The building had been a dwelling. At page 547:

' * * * * the building had not been occupied as a dwelling for about a year before the fire, and that the construction of one or more rooms in it had been changed to be suitable for a school, * * * and that the plaintiff employed a teacher to teach his own children therein, and the children of his neighbors for a term of three months, and that the school had from ten to twelve scholars, and that the others who sent children to the school paid as tuition, or towards the teacher's board, fifty cents a week for each scholar, and that the school had been kept two or three weeks before the fire. The instruction was in the German language.

In *Omaha Medical College vs. Rush* (35 N. W. 222), (Neb.) a statute exempted from taxes "property * * * used exclusively for * * * school * * * purposes."

It was held that this exempted a medical college. At page 224:

"The first definition of the word 'school' given by Webster is: 'A place for a learned intercourse and instruction; an institution of learning; an educational establishment; a place

for acquiring knowledge and mental training.' The defendants contend, with considerable earnestness, that the 'school purposes' mentioned in the statute apply only to the lower grade of institutions of learning and do not include higher institutions, like colleges. We can see no good reason for thus limiting the meaning of the word 'school'. An examination of any work in which the subject is fully discussed will show that the word, in its broad sense, is applied to any institution of learning; and it evidently is used in that sense in the statute. The exemption, therefore, applies to any institution of learning used exclusively for school purposes."

In the State Board of Pharmacy of Kentucky vs. White, 84 Kentucky, 626, it was held that a graduate of a "School of Pharmacy" is a graduate of a "College of Pharmacy" within the meaning of the Pharmacy Act. At page 633:

"The term 'school' is a generic term. In its broad sense it includes all educational institutions. Generally speaking, school and college are convertible terms. It is correct to speak of any educational institution as 'a school'.

Among other definitions given in the Standard Dictionary of 'school' is:

"An educational institution, in the widest sense including all establishments for systematic instruction of every kind and grade from universities and colleges to establishments for teaching riding and dancing. Especially (1) any institution of elementary instruction below the college, or university, as the youth in our schools and colleges. (2) An institution of high grade," etc., etc.

Kindergarten is defined in the Standard Dictionary:

"A school for little children, in which instructive diversions, object-lessons and healthful games are prominent features."

In order to ascertain the meaning and intent of the people in adopting the ordinance, it is necessary, and in fact essen-

tial, to determine the purpose of this enactment and the reasons impelling the people to place schools and churches in a restricted district so far as the sale of liquor at retail is concerned.

The object of the ordinance was not to protect schools as schools, but to protect the pupils attending the same, and whether it be a public or private school, the pupil attending one or the other is entitled to this same protection.

The Board of Police Commissioners evidently entertained no doubt as to the character of the San Francisco Business College. It took it for granted that said College was a 'school,' because the records of the proceedings of said Board show conclusively that it had in mind that a school existed in the building having its entrance at 908 Market Street. The motion of Commissioner O'Grady for the granting of the permit shows that he was mindful of that fact, as was also Commissioner Spiro, who seconded said motion.

The only consideration given the proximity of the school was that the entrance to said saloon be located on Fifth Street beyond the one hundred and fifty feet limit, so as to avoid all question as to whether or not said saloon was within one hundred and fifty feet from the school.

The Board of Police Commissioners is granted by the ordinance discretionary powers in arriving at any conclusion of fact in relation to granting of saloon licenses. One of the facts in this case was whether or not said college was a school within the meaning of the ordinance, and that fact was determined by the Board in the affirmative, and the Board was correct in that determination.

Another question of fact in relation to the granting of said license was as to whether or not the school was within one hundred and fifty feet from the premises described in the application of said Corr. The Board of Police Commissioners, by the granting of said license, determined that said saloon was not within one hundred and fifty feet of the school. It based its determination in that regard upon a ruling adopted by the Board on May 23, 1910, as follows:

“Measurements between church or school and premises where liquor is sold.

The resolution of this Board of May 2, 1910, regarding the measurements between church or school and premises where liquor is sold was amended to read as follows:

Resolved, That the Board does hereby establish the rule that the measurement of 150 feet shall intervene between the nearest public entrance of the premises where liquors are to be sold and the nearest line of church or school property, said measurements to be made by streets or sidewalks and not as the crow flies or by air line.”

A practical application of that ruling, conceding for the present, but not deciding, that the Board possessed the power to make an arbitrary rule of that kind is this: That where the school property is on one street and the saloon premises on another, running at right angles to the first street, then the distance of 150 feet shall be measured along the street or sidewalk and not by an air line between the properties. The premises may abut one on the other at the rear, but the distance between them, measuring along the sidewalks or street lines, may be more than 150 feet.

In my opinion such a method of measurement is a direct evasion of the ordinance and is designed for the purpose not of carrying the ordinance into effect and protecting the school children, but of permitting saloons to be established within the restricted area, which would otherwise, by a strict observance of the ordinance, be not permitted to be established therein.

Even, though, the ruling adopted by the Board of Police Commissioners, as aforesaid, be taken as a guide, the distance measured according to its terms would be as follows:

The nearest public entrance of the premises where liquors are to be sold on the southeast corner of Market and Fifth Streets, is the entrance to said premises fronting on Market Street, as appears by the diagram attached to the report of

the Police Captain on said application. That entrance must be taken as the starting point and not the point on the east side of Fifth Street, distant eighteen feet south from Market Street.

According to the plat of survey at Fifth and Market Streets, San Francisco, scale 20 feet to one inch, surveyed by John M. Punnett, civil engineer and surveyor, San Francisco, April 20, 1912, and introduced in evidence by the applicant Corr at the meeting of the Board of Police Commissioners, held on Thursday, the 25th day of April, 1912, the distance from a point on the southeast corner of Fifth and Market Streets across Market Street to the northwesterly line thereof is 120 feet; proceeding at right angles northeasterly from the point of intersection of the first line with the said northwesterly line of Market Street, the distance as disclosed by said blue print is 18 feet 4 inches. That makes the total distance 138 feet 4 inches from the said point on the southeast corner of Market and Fifth Streets to the entrance of the building at 908 Market Street. Further measurements, as disclosed by said diagram, taken along the passageway of that building, up the elevator shaft to the third floor, and thence along the third floor to the entrance to the San Francisco Business College, is in direct conflict and contravention of the ruling of the Board of Police Commissioners as to the measurement of one hundred and fifty feet, for the reason that said distance does not intervene between the nearest public entrance to the premises where liquors are to be sold and the nearest line of church or school property. Nothing is said in ruling as to measurements within the property of such church or school.

The correct method of measurement of the distance of one hundred and fifty feet between the place or saloon where liquor is sold to be consumed upon the premises and any church or school, was established by the case of *Commonwealth vs. Jones*, 8 N. E. page 603. That case involved the question of distance under a statute as follows:

“No license * * * shall be granted for the sale of intoxicating liquors in any building or place on the same street within 400 feet of any building occupied, in whole or in part, by a public school.”

The Court uses the following language:

“The building containing the license room and the school house were on Main Street. The distance from the Campbell House to the school house, if measured in a line to the street, thence along the street to a point opposite the school house and thence to the school house, is more than 400 feet. The defendant contends that this measurement should be used to determine the distance between the two buildings under the statute. If the two buildings are situated upon the same street, i. e., have entrances from a common street, the 400 feet is to be determined by the distance between the two buildings without any other measurements. The distances of the buildings from the street form no part of the distance of the buildings from each other. It is not necessary that the buildings should be situated upon the line of the same street. They may, perhaps, be some distance from the line of the street, with a walk leading to them, but they are situated as completely upon the same street as they would be if the buildings abutted upon the line of the street. Whenever the school house and the building in which a license is granted are situated upon the same street, whether close to the street or some distance from it, the 400 feet between them is to be determined by measuring the nearest point of each house to the other. This will determine the distance required by the statute.”

In *Butler vs. State*, 89 Ga. 821, the indictment was for selling liquor within four miles of a church, and it was urged that the Court erred in denying a new trial. The judgment of the Lower Court holding that the distance of three miles between the church and the saloon was to be measured as the crow flies in a straight line was affirmed.

In *State vs. Greenway*, 92 Iowa 472, at page 474, the Court said:

"The act further provides that in 'no case shall said business (liquor) be conducted within 300 feet of any church or school building'. The fact is that the Congregational Church in the city is within 300 feet of the saloon in a direct line, but that it is more than that distance by the traveled way * * * the distance should be ascertained by an air line from one place to the other. It appears to us that this is the proper construction of the law and that any other method would lead to confusion and uncertainty."

Citing with approval *Gass vs. Jone*, 142 Mass. 573.

Sheehy vs. Johnson, 12 App. Cases, Dist. of Columbia, page 92:

"That case involved the Act of Congress of February 28, 1891, providing 'that on and after the passage of this Act no license for the sale of intoxicating liquors in any place within one mile of the Soldiers' Home property in the District of Columbia shall be granted' * * * the mile limit * * * should be measured in a straight line upon a level plane * * * We must take it to be the general rule that unless some other mode of measurement is prescribed or enacted, the distance is always to be measured in a straight line on a horizontal plane."

At page 103, the Court said:

"It is quite clear that it was the purpose of the act to establish the belt of territory surrounding the Soldiers' Home property on all sides by means of straight lines radiating in a horizontal plane from the outer wall of the enclosure of the property, such belt being a mile wide at every point within which no license whatever should be granted for the sale of intoxicating liquors."

Low vs. Porter, 9 South 975:

The statute prohibited the sale of intoxicating liquors within three miles of the 'Methodist and Baptist Churches in the town of Danston'.

The Court said :

“The legislative intent was to establish a prohibited district, which would include an area extending three miles in every direction from the churches.”

In the case of *State vs. The Board of Excise Commissioners of Trenton*, reported in 29 Atl. Rep. at page 15, the Court said :

“The application was for a license to be granted for a new place, which is within 200 feet of the Warren Street Chapel of the Methodist Episcopal Church. Section 9 of the ordinances of the Excise Board forbids the granting of a license in such case. In *Leigh vs. Hind*, 9 Barn. C. 774, the assignor of a lease of a public house in London covenanted that he would not keep a public house within the distance of half a mile from the premises assigned. Lord Tenterden and Justice Littledale held that the distance must be measured by the shortest way of access between the two places, although that required the use of the footpath part of the way and the carriage road the other part of the way. Justice Parke adopted the more stringent rule that the distance should be measured between two points without regard to the means of communication. This rule excluded the right to grant the defendant’s application; measured by the nearest mode of access, his house is within the prohibited distance. See, also, *Com. vs. Jones*, 142 Mass. 573, 8 N. E. 603, (citing herein *supra*). While the present ordinance is in force, no license can legally be granted to Cox.

The license, being for a new place, was not granted at a meeting held upon the second Wednesday of either August, November or February, or at a time to which any of said meetings had been adjourned, but at the monthly meeting in April, contrary to the rules of the Board of Excise. The Board suspended its rules for the purpose of enabling it to grant this license immediately. The public is interested in knowing when licenses are to be considered and passed upon. *Dufford vs. Nolan*, 46 N. J. Law 87; *Austin vs. Atlantic*

City, 48 N. J. law, 118, 3 Atl. 65. Persons opposed to this license had a right to suppose that the Board would hear it in the orderly way, according to its own rules. No more effectual way could be desired to prevent the opponents of license from being heard than that resorted to in this case. Even admitting that this was a mere rule, as distinguished from by-law or ordinance, and that it was not necessary to repeal it in the manner provided by the statute for repealing ordinances and by-laws, still the Board was bound; in suspending its rules, to afford reasonable time and opportunity for a hearing to those who might desire to resist the granting of the license. State legislatures and like bodies may undoubtedly suspend their rules at pleasure in order to pass bills, but the cases are not parallel. In such legislative proceedings the members alone are concerned, the public have no legal right to be heard upon the passage of a bill."

It might be argued that the Board of Police Commissioners, having granted the license to Corr for the premises on the southeast corner of Fifth and Market Streets, repealed, by implication, the rule of the Board adopted February 8, 1912, providing that from that date the Board would grant no further permits to conduct saloons, except hotel bars, on Market Street from East Street to Castro Street.

At this point, I desire to repeat my conclusion as to the transfer of license being the grant of a permit, in the opinion given to the Board of Police Commissioners on April 18th as follows:

"I entertain not the slightest doubt that the language used in Section VI is explicit on the proposition that the transfer of a license from one place to another within the limit specified would be to grant a permit to conduct a "newly established place or saloon." It is immaterial that the section does not prohibit, in express terms, the transfer of a license within said limits. It says "no permit shall be granted" and that signifies the highest form of authority of the Police Commissioners. In my opinion the use of the word "granted" includes the word "transferred" * * *.

The case of *State vs. The Board of Excise Commissioners of Trenton*, lastly hereinabove cited, holds to the contrary; that they had no power to suspend their rules or repeal them in that manner.

As I have shown hereinabove, the blue print introduced by the applicant *Corr* in evidence at the meeting of the Board of Police Commissioners held on April 25th, 1912, discloses the fact that the measurement was continued along the corridor of the premises at 908 Market Street, and thence up the elevator shaft to the third floor and thence on to the door leading into the San Francisco Business College.

The case of *in re Underhill*, reported in 39 N. Y. Supp., at page 575, puts the stamp of disapproval upon such method of measurement. In that case, *Underhill's* premises, in which the traffic is carried on by him, consists of rooms of which he is the lessee occupied by him as a saloon situated in the second story of a building, the entrance to which is by a covered stairway leading up from the sidewalk below and in front of the building.

The Court uses the following language, at page 576, in passing upon the point presented:

“It is contended on behalf of the respondent that the entrance to his premises is the door of his saloon at the head of the stairway, and that, measuring from that entrance down the stairs, and by the nearest feasible way, from the foot of the stairs to the nearest entrance of the nearest building exclusively occupied as a dwelling, the distance from the entrance to his saloon is over 200 feet; but, measuring the distance from the door of the saloon through buildings in an air line, the distance is less than 200 feet to several of the neighboring dwellings. The provision of the statute under consideration should have a reasonable construction, and it would seem that the most feasible way which one could go from the entrance to the saloon to the entrance of a dwelling, not necessarily by the sidewalks, but in an air line where it is practicable, as by going directly or diagonally

across a street or a yard, or around the corner of a building if that is the only way practicable to go from one point to the other, is the way of measurement intended by the legislature. If a direct line from one place to the other in all cases were intended, the law should have so stated. As to the question which shall be regarded as the nearest entrance—the door entering the room, or the entrance at the foot of the stairway—the case is not so clear. The door at the head of the stairway is the entrance to the respondent's premises. That is the entrance into his saloon from the outside of the building, and the only entrance thereto which he owns and has the exclusive control of the stairway being used in common with the occupants of the other building. But the stairway is an entrance to his premises, and it also is an entrance which he has the legal right to use, and does use. If he had the exclusive use and control of the stairway under the demise of the saloon premises, there would, I think, be no question but that the entrance to the stairway would be regarded as the entrance to the respondent's premises, and the nearest entrance, within the meaning of the statute, from which the measurement to the entrances of the dwellings within 200 feet therefrom should be made. The fact that the demise is of the use of the stairway in common with others makes it no less an entrance to the respondent's saloon. The object of the provision of the statute under consideration is to remove places in which traffic in liquors is carried on from close proximity to dwellings. The law fixes 200 feet between the nearest entrance to the dwelling and the nearest entrance to the premises where the traffic in liquor is carried on as the limit. These would, ordinarily, be the street entrances, and were, no doubt, the entrances which were intended to be taken for the purpose of the measurement. I am of the opinion that in this case the street entrance to the respondent's premises is the one, within the meaning of the statute, from which the measurement should be made. If the foot of the stairway is taken as the entrance to the respondent's premises from which to measure to the nearest entrance to a building occupied exclusively for a dwelling,

measured in the way already indicated—a direct line, over an unobstructed route, across the street to the entrance to the premises of Mr. Gallup, and thence directly to the entrance to his dwelling—the distance is less than 200 feet; and consequently the respondent was not entitled to liquor tax certificate. * * *

In the case of *in re McMonigle*, reported in 84 N. Y. Supp., at page 1068, at page 1071, the Court said that the measurements are to be made in a straight line, disregarding all other obstructions. Cited matter of *Ruland*, 21 Misc. Rep. 504. 47 N. Y. Supp., 561; Matter of *Bridge*, 36 App. Div. 533, 55 N. Y. Supp. 54.

That the location of the main entrance to the saloon premises to be considered by the Board of Police Commissioners in measuring distances, is the public entrance disclosed by the petition at the time of the filing of the same, has been held to be controlling in the case of *in re Cheney*, 72 N. Y. Supp., page 134, in which the Court said:

“The application for the license in question upon March 27th, having been made, and the license fee having been paid before the new door in which is described in the proceedings as the ‘parsonage’ was cut, the status of the application, in my opinion, is to be governed by the facts and conditions existing at and prior to that time (March 27th) rather than by those which occurred thereafter.”

Therefore, the introduction of a blue print by the applicant, Corr, at the hearing by the Board of Police Commissioners at the meeting of April 25th, showing the point on the east side of Fifth Street, distant 18 feet south from Market Street, could not change and did not change, the status of the application at the time the same was filed.

You are, therefore, advised as follows:

First; That the San Francisco Business College, located and conducted in the premises having its main entrance at No. 908 Market Street in this City and County is a “school”

and that said school comes within the purview of Section 6 of Ordinance No. 1038 (New Series).

Second; That said school is within one hundred and fifty feet of the premises at the southeast corner of Market and Fifth Streets.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

Authenticated Copy of Judgment Filed With the Auditor
After a Valid Assignment of the Claim Has no Validity
Against Assignees' Claim.

April 27th, 1912.

Sir: I am in receipt of your communication of April 17th, which reads as follows:

In the matter of a temporary deposit of \$1,500.00 held in this office at the request of Auditor Boyle, to meet an alleged claim of Sullivan, Sullivan & Roach vs. the Assignees Condon, McGlynn & Co. The Auditor informs me that there has been filed with him a full transcript of the judgment, duly authenticated under Section 710 of the C. C. P.

Will you kindly advise this office if this money is being legally held or can I return the same to the Anglo-California Trust Co., the Assignees of Condon-McGlynn Co.?

On February 9th, 1912, I advised you upon this same matter. At that time it appeared that a claimant to the money, Mr. Sullivan, who is a judgment creditor of the Condon-McGlynn Company, had filed with the Auditor an abstract of a judgment rendered in his favor and against the Condon-McGlynn Company. I advised you under the authority of *Erkson v. Parker*, 3 Cal. App. page 98, that Mr. Sullivan had not complied sufficiently with Section 710 of the Code of Civil Procedure to enable him to demand the relief provided in that Section.

From your communication it does not appear when the transcript of the judgment, duly authenticated under Section 710 of the Code of Civil Procedure, was filed with the Auditor. I assume that it was filed since the date of that opinion. I assume also from your communication that the Anglo-California Trust Company is the assignee of the Condon-McGlynn Company and that the assignment made to the Condon-McGlynn Company was made in good faith and for value.

I further assume that the duly authenticated transcript of the judgment was filed after the assignment had been made by the Condon-McGlynn Company to the Anglo-California Trust Company. If the facts are as I have assumed them to be the Anglo-California Trust Company is entitled to this money.

The case of *Erkson v. Parker*, referred to in my opinion of February 9th, 1912, is a case on all fours with the present one. In that case an abstract of the judgment was filed. Thereafter an assignment was made by the judgment creditor to third parties. After the assignment had been made a duly authenticated transcript of the judgment against the judgment creditor was filed. It was that the assignees were entitled to the money.

If a valid assignment was made by the Condon-McGlynn Company to the Anglo-California Trust Company all the rights of the Condon-McGlynn Company to the money passed to the Trust Company and therefore the Condon-McGlynn Company has no interest whatsoever in this money.

Section 710 of the Code of Civil Procedure prescribes the method or the levying of execution upon money owing by the municipality to the judgment debtor. When Mr. Sullivan filed his authenticated transcript of his judgment against this money the Condon-McGlynn Company had no rights whatsoever to the money and it follows that Mr. Sullivan can not execute upon this money on a judgment against the Condon-McGlynn Company.

I therefore advise you as follows:

You must satisfy yourself of the date of the assignment to the Anglo-California Trust Company, the date that the authenticated transcript of the judgment was filed and whether the assignment is a valid one made in good faith and for value. If the assignment was made in good faith and for value and was made prior to the time that the authenticated transcript to the judgment was filed the assignee is entitled to receive the money in question.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Non-Resident Advisory Architect May Make a Valid Demand for Services.

May 7th, 1912.

Sir: I have your communication of May 6th, asking my opinion "regarding the validity of a demand drawn in favor of John Galen Howard in the sum of \$1,666, for services rendered as Advisory Architect to and including March 29th, 1912, as per Resolution No. 15,804 (2nd Series) of the Board of Public Works to be paid out of the fund set aside for the Civic Center and City Hall Advisory Committee." The question as to the validity of the demand arises, you state, from the fact that it has been called to your attention that Mr. Howard is not a resident of San Francisco.

Opinion.

The matter of the employment of experts who are non-residents of the City and County of San Francisco was fully covered in my opinion of February 10th, 1912, given to the Mayor in response to a request from him, a copy of which was sent to you.

I am firmly of the opinion that Mr. Howard's engagement by the City as an Advisory Architect in regard to the City Hall and Civic Center problems comes within the rule stated in my opinion of February 10th, 1912, namely, that the City has the power to engage experts to advise as to certain matters or to bring about certain results. Mr. Howard occupies the same position as that occupied by Mr. John R. Freeman and Bion J. Arnold so far as their respective engagements are concerned and I therefore advise you that, in my opinion, the claim presented by Mr. Howard is a valid claim against the City and County.

Respectfully,

PERCY V. LONG,
City Attorney.

Auditor.

City Can Not Contribute Funds to Private Organizations Performing Relief Work.

May 20th, 1912.

Gentlemen: I am in receipt of your communication of the 11th inst., which reads as follows:

"The Committee on Public Welfare wish the opinion of the City and County Attorney as to the right of the city under the Charter, to contribute funds to an organization performing relief work which the city is unable to perform, and which lessens the expenditures of the city to the extent of its cost:

As an instance: The Industrial Relief Agency for Homeless Men at 335 Main St., has during the past two years rendered great service for men discharged in a helpless condition from the hospital, or unable to be taken in at the Relief Home. Men without food and shelter who frequently apply to the prison or jails have been cared for. It has served the purpose of a municipal lodging house during the past winter, and on the occasion of the late parade of the unemployed, of-

ferred to provide for those willing to work, and for a time cared for an unusual number of applicants.

The expense of sustaining this work has been a heavy drain on the citizens who have conducted the charity and the city ought in some way to bear a portion of the expense.

If a general allowance is prohibited by the Charter, would it be permissible to render a bill to the city for services definitely rendered, in the care of these homeless men? And could the Board of Supervisors pay the same from the public treasury?"

This inquiry brings up a question very similar to that with which I had to deal in my opinion under date of October 23rd, 1908, to the Hospital and Health Committee of the Board of Supervisors. At that time the Supervisors wished to know whether the Board could contract with the University of California and Stanford University for the care and maintenance for a period of several years of certain cases ordinarily committed to the City and County Hospital. I advised that this could not be done and the same general reasons controlling in that case apply to the question which you have submitted to me. That is, it is a question of the power of the Board of Supervisors. The powers of the Board are set forth in the Charter and it is an elementary principle that the legislative body has such powers as have been granted to it in the Charter and no others. Only those powers which are necessary to carry out some power expressly granted can be implied.

Under Subdivision 11 of Section 1 of Chapter II of Article II of the Charter it is provided that "subject to the provisions, limitations and restrictions in the Charter contained, the Board of Supervisors have the power to establish, maintain, regulate and change, discontinue and reestablish city and county jails, prisons and houses of detention, punishment, confinement and reformation, hospitals and almshouses."

Here we see a duty placed on the Board to provide for hospitals and almshouses. There is no provision in the Char-

ter authorizing the Supervisors to contract with any private organization for doing the character of work which you describe. Section 1 of Chapter III of Article II of the Charter provides that "all contracts for goods, merchandise, stores, supplies, subsistence or printing for the City and County, as well as for all subsistence supplies, drugs and other necessary articles for hospitals, prisons, public institutions and other departments not otherwise specifically provided for in this Charter, must be made by the Supervisors with the lowest bidder offering adequate security, after publication for not less than ten days in the official newspaper; and no purchase thereof or liability therefor shall be made or created except by contract."

Section 3 of Article X provides that the Board of Health "shall have the management and control of the city and county hospitals, almshouses, ambulance service, municipal hospitals, receiving hospitals, and all matters pertaining to the preservation, promotion and protection of the lives and health of the inhabitants of the City and County." And further, that the Board of Health shall have, except as provided in Chapter 111 of Article II of the Charter, the "exclusive control and disposition of all expenditures necessary in the institutions immediately under its control."

We see therefore that the purpose of the charter is to place such institutions under the control of the city officials, and this intent is made the more clear when we read the Charter sections on taxation.

Section 1 of Chapter 1 of Article 111 of the Charter provides that "on or before the first Monday of April of each year the heads of departments, offices, boards and commissions of the city and county shall send to the Supervisors an estimate in writing of the amount of expenditure, specifying in detail the objects thereof, required in their respective departments, offices, boards and commissions, including a statement of the salaries of their subordinates."

Section 2 of the same chapter and article provides that "on or before the first Monday of May in each year the Audi-

tor shall transmit to the Supervisors an estimate of the probable expenditures of the city and county government for the next ensuing fiscal year, stating the amount required to meet the interest and sinking funds for all outstanding funded debts, and the wants of all departments of the municipal government in detail, and showing specifically the amount necessary to be apportioned to each fund in the treasury."

It is then made the duty of the Supervisors, from these reports, to prepare their budget of the amount estimated to be required "to pay the expenses of conducting the public business of the city and county for the next ensuing fiscal year." (Sec. 3). When the final estimate is made in accordance with the provisions of Chapter 1 of Article 111 of the Charter "the several sums shall then be appropriated for the ensuing fiscal year to the several purposes and departments therein named." (In the budget—Sec. 4). These several sums having thus been appropriated the Board of Supervisors "must cause to be raised annually according to law, and collected by tax, the amounts so appropriated less the amounts received from fines, licenses and other sources of revenue." (Sec. 5.)

Section 11 then provides that "the Supervisors shall levy the amount of taxes for city and county purposes required to be levied upon all property not exempt from taxation. The amount shall be sufficient to provide for the payment during the fiscal year of all demands upon the Treasury authorized to be paid out of the same." Then after the taxes have been collected, any department having charge of any particular work for which money is to be used, draws against the fund appropriated by the Supervisors to that particular department.

When we consider all of these provisions of the Charter we see a complete governmental scheme outlined for almshouses and hospitals and we also see a complete scheme for the raising of money for the conducting of almshouses and hospitals under the direct control of the city. The power to provide the necessary funds and to contract for the necessary

subsistence and supplies is given to the Board of Supervisors and the supervision and expenditure of the funds is provided for in the Charter.

It would appear, then, that this method being so clearly outlined in the charter, the municipality would be permitted to adopt no other method and no implied power can be construed under which the city can pay over funds to private individuals or organizations for doing the work which, under the Charter, the city is expressly authorized itself to do.

Respectfully,

PERCY V. LONG,
City Attorney.

Committee on Public Welfare,
Board of Supervisors.

Initiative Provisions of Charter Should be Liberally Construed—The Question of Bonded Indebtedness to Acquire Home Telephone System Should be Submitted to the People.

May 20th, 1912.

Gentlemen: I am in receipt of your communication as follows:

“The Public Utilities Committee would like you to advise it at your earliest convenience regarding the powers of the Board of Supervisors in the matter of calling for an offer from the Home Telephone Company for its plant, etc., also the powers of the Board in the matter of issuing bonds for the creation and operation of a municipal telephone system.

This matter is pending before the Committee on a petition from the Municipal Telephone and Anti-Merger League which requests the Board: ‘In response to the mandate of the people, to take immediate steps to acquire either by original construction or the purchase of the plant constructed by the Home Telephone Company, an automatic telephone sys-

tem by the issuance of bonds for such sums as may be necessary for the purpose.'

'We further request that you commence these proceedings in your Board in the same manner as has been done with other bond issues under the direction of the proper municipal officers and that each act and proceeding be submitted to the expert bond attorneys as has been done with other bond issues, so that no question as to their validity can be raised.'

While this petition was under consideration, the attention of the Committee was called to the report of the Election Commissioners which shows that the second proposition on the ballot at the recent telephone election failed of necessary two-thirds majority by 814 votes. This was the proposition which provided for a bond issue of \$6,000,000.

The attention of the Committee was also called to the Charter provision, Section 8, Article II, Chapter III, page 144, which provides 'that there shall not be held under this Chapter more than one special election within a period of six months.'

Opinion.

Your request for an opinion is with reference to the two ordinances submitted to the people of this City at a special election held on March 29th, 1912, under the provisions of Chapter III of Article XI of our Charter which deals with the "Initiative".

Under date of February 26th, of this year, I advised your Board that this attempt to order a bond election for the acquisition of a public utility, to-wit, the Home Telephone System, without any proceedings other than the passage of the ordinances, could not be of any effect because the ordinances so submitted to the people were clearly invalid under the law as prescribed in our Charter.

There were two ordinances submitted. The first was a general declaratory ordinance determining and declaring that the public interest and necessity required the acquisition, construction, completion and equipment of a public util-

ity, to-wit, a telephone system by the City and County of San Francisco. The second of these ordinances provided for the calling of a special election to be held for the purpose of submitting to the voters of the city a proposition to incur a bonded indebtedness in the amount of \$6,000,000, for the acquisition by the city of an existing public utility, to-wit, the Home Telephone system.

The first of these ordinances contained the following general provisions:

1st. Section 1. Determining and declaring that the public interest and necessity required the acquisition, construction, completion and equipment by the City of a public utility, to-wit, a telephone system.

2nd. Section 2. It was further determined and declared that the cost of the acquisition, construction, etc., of such public utility would exceed the income and revenue provided for the City and County for any one year and would render it necessary to incur a bonded indebtedness therefor.

As your Board was advised in my opinion above referred to, this declaration was not a proper determination because the voters were not given an opportunity prior to the election at which they expressed their views, to know what the original cost of any new system might be, or to know for what amount any existing company might sell such system as it might own.

3rd. Section 3. The Board of Public Works was directed to procure through the City Engineer and to place on file with the Board of Supervisors plans and estimates of the cost of original construction and completion by the City and County of such a public utility. But this information would not be before the people at the time of the election.

4th. Section 4. It was determined and declared that the public interest and necessity required the immediate acquisition by the city of a certain public utility called "The Home Telephone System." This declaration was intended as a final determination upon which to base an ordinance adopted by the people which ordinance would in turn call for an elec-

tion, at which the people would decide as to the issuance of bonds for the purpose of purchasing the Home Telephone System. So considering the purpose of the declaration, we see that this ordinance was of no effect because no opportunity was given to the voters prior to the holding of the election at which the declaration was made, to know the cost of the original construction of any such system or to know whether the owners of the Home Telephone System or any other owners of an existing telephone system would sell to the City.

5th. Section 5. It was determined and declared that public interest and necessity required that any merger of the Home Telephone System and the Pacific Telephone and Telegraph Company's system and a requested permission of the City and County to so merge said systems, be disapproved and rejected.

When we consider the main purpose of this and the second ordinance to be the acquisition of a public utility, to-wit, the Home Telephone System, or an equivalent of that system, we have seen that the ordinances failed in their immediate and necessary accomplishments of that purpose. This, by failing to provide for the obtaining of plans and estimates of original construction and for the receiving of offers from the Home Telephone Company or from any other company.

Therefore, it cannot be said that this declaration of policy to prevent the merger is a proper incident to the accomplishment of the main purposes of these ordinances, for these main purposes are made impossible of accomplishment on account of the manner in which these ordinances were submitted to the people.

6th. Section 6. It is declared that this ordinance is the first of a series of ordinances which will be adopted for the purpose of providing that a bonded indebtedness of the City be incurred for the purpose therein enumerated. Considering that purpose to be the immediate submission to the people of a proposition to incur a bonded indebtedness for the specific purpose of acquiring a telephone system we have

seen that the steps outlined in these ordinances do not meet the charter requirement of informing the voters what it would cost to originally construct such a system or the other charter requirement of informing the voters of the price for which they might purchase any existing telephone system.

Taking up the other ordinance, we find its purpose stated as follows: The calling of a special election to submit to the voters a proposition to incur a bonded indebtedness in the amount of \$6,000,000 for the acquisition by the City of the Home Telephone system. It is recited in the preamble of this ordinance and in Section 2 thereof, that offers of sale of existing public utilities had been considered by the people, and it is declared that the estimated cost of the acquisition of this system could not be paid except by incurring a bonded indebtedness therefor. But it is apparent that no steps had been taken by which the voters could be informed on either of these subjects. Therefore, the passage of this ordinance by vote of the people who were thus compelled, by reason of the way the proposition was submitted to them, to vote blindly, contrary to the clear intent of our Charter, could not possibly result in the issuance of these bonds even if the necessary two-thirds vote of the people had been obtained.

However, I am now called upon by your request to advise as to the effect of the vote of the people upon these two ordinances, in the light of the provision of Section 13 of Chapter III of Article XI of the Charter. This section, under the general initiative chapter of our Charter, provides as follows:

“Any declaration of policy or principle of legislation may be submitted to the electors in the manner provided for the submission of ordinances; and when approved by a majority of the voters voting at any election, it shall thereupon be the duty of the Board of Supervisors or other legislative body to enact an ordinance or ordinances to carry such policy or principle into effect.”

Each of these ordinances received the approval of a majority of the voters at this election.

To return, then, to the first of these ordinances we saw that in Section 1 it was "determined and specifically declared that the public interest and necessity require the acquisition, construction, completion and equipment by the City and County of San Francisco of a telephone system of communication in the said City and County of San Francisco as a public utility owned, operated and controlled by the City and County of San Francisco."

This is certainly a specific declaration of policy which was adopted by a vote of a majority of the citizens voting at this election.

2nd. In Section 4 of this ordinance it was "determined and specifically declared that public interest and necessity require the immediate acquisition by said City and County of San Francisco, of that public utility, called the Home Telephone System. Here again we have a declaration of policy in the clearest possible language to the effect that a majority of the voters voting at this election intended that the City should acquire the Home Telephone System. This could not possibly be of any effect as a final determination that the Home Telephone System must be bought, inasmuch as the voters were not given any opportunity to know the cost of original construction of such a system or for what price they might purchase that or any other system. Nevertheless, it seems clear that the general policy that the voters expressed by their majority vote at this election of purchasing this system if that could possibly be done under the provisions of the Charter, was declared in the clearest possible manner.

3rd. Section 5 provided as follows:

"It is hereby determined and specifically declared that public interest and necessity require that any merger of the telephone systems of the said Bay Cities Home Telephone Company and of the Pacific Telephone and Telegraph Com-

pany, and the requested permission of the City and County of San Francisco, to so merge said systems be disapproved, and rejected, and defeated.”

While this declaration of policy could have no immediate effect in the matter of finally determining that the Home Telephone System should be purchased by the City, nevertheless it would appear that here we have a clear declaration of policy for the purpose of carrying out the general intent of the people to purchase the Home Telephone System if this could possibly be done under the Charter. As one of the steps to be taken in this general policy of acquisition, the people declared against the Home Telephone Company being permitted to merge with the Pacific Telephone and Telegraph Company.

Then taking up the other ordinance, we find it stated to be for the purpose of calling a special election to submit to the voters a proposition to incur a bonded indebtedness in the amount of \$6,000,000 for the acquisition by the City of the Home Telephone System. This declaration could not possibly result in any immediate acquisition of such Home Telephone System because the Charter mandate requiring the obtaining of plans and estimates in the matter of the original cost of such a system and the obtaining of offers of any existing telephone system had not been complied with. However, here again it would seem that there is a clear declaration of policy upon the part of the majority of voters voting at this election that, if possible under the provisions of the Charter, this Home Telephone System should be purchased by the City.

It would appear that two possible objections might be made to considering the adoption of these ordinances by the voters as a declaration of policy under the terms of Section 13, Chapter III, Article XI of the Charter. In the first place it might be said that these ordinances violate Section 11, Chapter I, Article II of the Charter which provides that “an ordinance shall embrace but one subject, which subject shall be expressed in its title.” That is, it may be claimed that in-

asmuch as the ordinances provide for two general subjects, first the declaration of policy as to the acquisition of a public utility, a telephone system, and second, the submission to a vote of the people of the proposition of a bond issue to acquire such a public utility, and in particular, the Home Telephone System, that the ordinances are invalid for any purposes whatsoever.

While it is impossible to combine these two purposes in any one ordinance because the voters could not intelligently vote upon these two general propositions at one and the same time, still I am of the opinion that when we consider the question in its other phase of a general declaration of policy by the voters of this City, that it seems clear that the voters have declared their intention to acquire a telephone system. And at the same time the voters determined that if possible they would purchase the Home Telephone System.

It would appear to me to be violating the spirit of the initiative provisions of our charter if we technically construe this general proposition of law that an ordinance shall embrace but one subject, by applying this elementary rule so as to say that the voters have not expressed a declaration of policy by their votes on these ordinances. It is one thing to determine the validity of these ordinances as constituting a necessary basis and foundation for the submission to the people, by means of one of them, of the proposition of a bonded indebtedness for the acquisition of any particular public utility. And it is quite another thing to consider these ordinances from the standpoint of a general declaration of policy for the acquisition of a public utility, be it the Home Telephone System or any other system, and from the standpoint of a general direction to the Board of Supervisors under the Initiative provision of the Charter, to take such steps as may properly and lawfully be taken under the Charter limitations to accomplish and make effective this general purpose of the voters of our City so expressed at this election. When we consider the people as attempting to lay down a plan of action, what could be more logical than that

they should at one and the same time declare the necessity of acquiring a public utility, and determine that they desire to purchase some particular company's system? And also, that, if necessary, a bond election should be held for that purpose. It may be urged that there is a third subject contained in the first ordinance, that is, a determination that the attempted merger would not be permitted. But, from the standpoint of a declaration of policy, the voters might very logically have decided that such a merger might in some measure thwart the consummation of their purposes in this matter.

The second objection that might be raised is that the charter initiative provision for a declaration of policy or principle of legislation by the people which must be followed by the passage of the necessary ordinances by the Board of Supervisors, was not intended to apply to the acquisition of a public utility. This argument would be based upon the general proposition that Article XII, dealing with the acquisition of public utilities, Section 3, provides another method, by which a petition signed by a certain percentage of the voters of our City might be presented to the Board of Supervisors as a declaration of policy for the acquisition of public utilities. Such a declaration of policy must, under the terms of this section, be followed by the passage of the necessary ordinance by the Supervisors leading to the submission to the people of the question of the incurring of the bond issue for the acquisition of such public utility. That is, if a bond issue be necessary. It might be claimed that this method is exclusive, and that inasmuch as such a petition so signed by the necessary percentage of our voters would constitute the necessary declaration of policy, that the provision contained in the Initiative chapter for a declaration of policy is not intended to include any declaration of policy in the matter of the acquisition of a public utility.

In my opinion, however, there is nothing exclusive in this provision for the signing of such a petition. Of course, as indicated in my former opinion, the method of proceeding

by petition is exclusive to the extent of making it impossible to submit by the initiative procedure an ordinance which at one and the same time would constitute a declaration of policy and also call for an election on the proposition of issuing bonds, when the people had not been properly informed as to the probable cost of original construction of such a public utility, or the purchase price for which any existing system might be obtained. But, when we consider the general question of whether the voters may by the initiative procedure of adopting an ordinance declare a question of policy, I can see no reason why they may not declare such a general policy by passing an ordinance just as well as by filing a petition signed by the percentage of voters. It is to be borne in mind that the initiative chapter of our Charter was adopted after the other provision for the filing of a petition declaring a policy. It might very well be that in some instances it would be to the advantage of the people to declare a general policy of legislation by the passage of an ordinance under the initiative chapter rather than by the filing of a petition under the public utility chapter of the charter. For example, it is provided in the section dealing with the declaration of policy by the filing of a petition, that "all propositions formulated under the provision of this section shall be completed within six months after the filing of such petition or petitions." Now it is possible that the voters of our City might wish to declare a general policy for the acquisition of several public utilities in an order which might be enumerated in the ordinance adopted. However, it may be that such propositions could not be finished within six months, as the requirements of the Charter might render this impossible. It would seem then, to be ignoring the spirit of the initiative chapter, if we prohibit our voters from declaring such a general policy, simply because another chapter of the Charter dealing with a declaration by petition, makes it mandatory that such policy must be completed within six months.

The provision in Section 8 of the Initiative chapter that there shall not be held "under this chapter" more than one

special election within a period of six months, has no application to this case. A bond election would not be held under this chapter. What is referred to in that section is the election at which an initiative ordinance may be adopted.

I am of the opinion that wherever any doubt exists as to the ability of the people to initiate legislation or to declare general policies of legislation under the initiative provisions of the Charter that that doubt should be resolved in favor of the people. The principle that the people may directly express their wishes in legislative affairs is a modern innovation which should be liberally construed and I am therefore of the opinion that no technical construction should be placed in the way of the mandates of the people in the declaration as to what their desires in these matters may be. It is not for the Supervisors, nor for me, nor for any of the other public officials to stand in the way of the expressed general policy of the people although it is of course necessary that all public officials should insist that this general policy must be carried out in conformity with the requirements and conditions expressed in the fundamental law of our City.

You are therefore advised that it is your duty under the Initiative chapter of our Charter, to take the necessary steps looking to the final submission to the people of a proposition to incur a bonded indebtedness for the purpose expressed in these ordinances. This, of course, assumes that the cost of such a system will render a bond issue necessary.

The people at such an election, would then have all the necessary information before them, as to the probable cost of such a system, either by original construction, or by the purchase of any system which might be offered to them. With this information properly gathered, in the manner contemplated by the Charter, the people would then be in a position to finally and intelligently determine for themselves what they desire to do in this important matter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

**Supervisors May Pass an Ordinance Requiring Proprietors
of Billiard and Pool Rooms to Obtain a Permit from
Police Commissioners.**

May 21st, 1912.

Gentlemen: I am in receipt of your communication requesting an opinion on the following:

Has the Board of Supervisors the power to adopt an ordinance which would place billiard and pool parlors in this City and County under the control of your Board, that is, by compelling the proprietor of such place to obtain a permit from your Board to conduct their business.

Art XI, Sec. 11 of the Constitution of California gives the power to any county, city, town, or township to "make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The Charter provision is as follows:

Art. II, Chap. II, Sec. 1, Local Laws.

"To ordain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations."

Thus the Charter has copied practically word for word the constitutional provision.

In a very recent case (*In re Junqua*, 10 Cal App., 602) the Appellate Court said:

"Under this direct grant, any such county, town, etc., may make and enforce within its limits all such police, sanitary, and other regulations as may be deemed necessary for the health, comfort and happiness of its inhabitants. The only limitation upon the exercise of this power prescribed by the constitution is that regulations so made shall not conflict with general laws. The power embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others."

The case of *Goytino v. McAleer* (4 Cal. App., 655) discussed the validity of just such control of pool and billiard rooms as your Board desires. In that case the Ordinance gave to the Board of Police Commissioners the power to decide whether a pool and billiard parlor in a certain section of the city was injurious to the public or not. In its opinion the Court said:

“The power to regulate or prohibit * * * extends to everything expedient for the promotion of public morals, welfare or safety. It is only when a business is lawful and has no injurious tendency that the governing body cannot say who shall and who shall not exercise the right itself. The business of conducting a pool-table cannot be said to be a useful employment or business. Nor can it be said that as ordinarily, if not invariably conducted, such business might not within the limits of reasonable probability be attended with uses injurious to public peace and morals. * * * No question of unwarranted interference with private business is here presented * * * but here the only attempt appears to be to confine the business of pool rooms, * * * to such restrictions and burdens as are necessary to prevent the infliction of public injury.”

In *Ex parte Meyers*, 7 Cal. App. 528, the Appellate Court held constitutional an ordinance of Los Angeles “prohibiting minors from visiting * * * public billiard and pool rooms.” The court there held also that a place need not be immoral per se to come under the supervision of the police power.

In *re Murphy*, 8 Cal. App., 440, also a pool and billiard room case, the court held:

“It thus appears that a public billiard-room and pool-room may, by reason of its environment of conditions existing in some communities, constitute a menace and danger to the morals and well-being of the citizens thereof; and it is, therefore, a subject for regulation or absolute prohibition,

notwithstanding the fact that it is not a nuisance per se, the right of the city depending upon a question of fact the existence of which it is conclusively presumed the Board of Trustees has properly passed upon, and the courts cannot go behind such finding. (Ex parte Shrader, 33 Cal. 279). Regulation measures, not extending to the stringency of prohibition, might afford adequate protection in some communities, while in others conditions might exist by reason of which the public welfare demanded the absolute suppression of the business. In all cases, however, the extent to which the power shall be exercised is a matter for the legislative body of the municipality to determine. The power of the legislative body of the state, under its police power, to enact general laws prohibiting poolrooms and billiard-halls cannot be questioned, and it must follow, in the absence of such general laws, that the police power of a municipality, within its territorial limits, under section 11 of article XI of the constitution, is coextensive with that of the state."

This case was affirmed by the Supreme Court in 155 Cal., 322.

In Goytino v. McAleer, 10 Cal. App., 683, affirming the same case in 4 Cal. App., 655, the Court held that "public billiard halls and pool rooms have been distinctly classified by this Court as among those which cannot lay claim to being within the rule applicable to 'useful enterprises,' and "it is only where a business is lawful and has no injurious tendency that the governing body cannot say who shall and who shall not exercise the right itself."

To the same effect is Los Angeles v. Hollywood, etc., 124 Cal., 344.

The Supervisors' power to pass an ordinance of this character is upheld in the recent case of Laurell v. Bush, 13 Cal. App. Dec., 506, decided Nov. 8th, 1911. This case held that an ordinance requiring a permit from the Board of Police Commissioners to conduct a nickleodeon was a valid one.

In view of the foregoing, you are advised that the Board of Supervisors has the power to adopt an ordinance placing the business of conducting billiard and pool-rooms under the control of your Board, by requiring them to obtain a permit from your Board to conduct such places of business.

In compliance with your request for a draft of an ordinance to meet the above situation, I beg to submit herewith draft of such an ordinance.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

St. Charles Place an Open Public Place or Alley.

May 24th, 1912.

Gentlemen: I am in receipt of your communication of May 17th, 1912, relative to the status of St. Charles Place, extending easterly from Kearny Street, between Pacific Street and Broadway, together with certain enclosures accompanying your communication.

It is quite evident from the maps of the City, from the Hicks-Judd Block Book, and from a general acquiescence since the fire, that the City's claims to St. Charles Place for a width of 14 feet 6 inches by a depth of 137 feet 6 inches easterly from Kearny Street, are undisputed. The title, however, to any part of St. Charles Place still further easterly from Kearny Street than said 137 feet 6 inches was before the Supreme Court of this State in *DeMartini et al., v City and County of San Francisco, et al.*, 107 Cal. 402, where it is held, as to the very property to which your communication refers, that:

"The claim of the defendants is that the premises in dispute comprise and constitute a part of St. Charles street,

and is a public way, made so by dedication of the owners thereof and acceptance by the public. The plaintiffs claim, to the contrary, that the land in dispute never was dedicated or opened as a street, and has never been open to public use or travel; that St. Charles street is a cul-de-sac, which never at any time extended across any portion of said lot 14, and terminated at the easterly line of lot 38.

The court below found: '1. That the plaintiffs are and have been in possession of all the land and premises described in the complaint, claiming title thereto ever since the month of July, 1884, and that the possession of said lot of land has been held by the predecessors of the plaintiffs ever since prior to the year 1865; and that there are and have been for many years improvements upon all of said premises, which improvements are the property of plaintiffs.

'2. That St. Charles street, mentioned and described in the complaint, does not extend easterly from or beyond the easterly line of fifty vara lot 38, and said St. Charles street does not pass across, along, or upon any portion of fifty vara lot No. 14, and that no part of the land described in the complaint has ever been dedicated or accepted, or used as a public street or highway, and no part thereof is a public street.'

De Martini v. San Francisco, 107 Cal. 405-6.

The Supreme Court then discusses these findings of fact and deems them sustained by the evidence.

On page 410 the Court says:

"Much stress is also laid upon the fact that, upon the engineer's map and other official maps of the city, the strip in dispute appears to have been laid down as a part of St. Charles street or alley; but this of itself raises no conclusive presumption that the land has become a public street, either by dedication or otherwise. Where, as here, the land was not a part of one of the originally reserved streets, but came to private ownership under an alcalde grant, the right to take it as a public street depends upon whether it has been dedicated as such. (*Whelan v. Boyd*, 93 Cal. 500.) The evidence

shows that at and before the time those maps were made and filed these premises were fenced, and have never since been opened to use as a street.

I am, therefore, constrained to hold that St. Charles Place, having a width of 14 feet 6 inches, is an open public place or alley from the easterly line of Kearny street to a point 137 feet 6 inches easterly therefrom and the City cannot rightfully claim said place or alley any further easterly than said last named point.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Supervisors, in Exercise of Police Power, May Compel Removal of Human Remains from Cemeteries Within City Limits.

May 25th, 1912.

Gentlemen: I am in receipt of your request for an opinion as follows:

“By direction of the Committee on Streets and Sewers, request is made for an opinion as to whether or not there has been sufficient legislation enacted to enable the Board of Supervisors to open the streets through the cemeteries, and also to cause the removal of the bodies and the abolition of the cemeteries of the City and County of San Francisco.”

As to the first part of your request concerning the legislation enacted to enable the Board of Supervisors to open streets through the cemeteries, I would say that it is my opinion that the Board of Supervisors has that power.

The cemeteries in San Francisco are owned by corporations organized either under the act known as the “Rural Cemeteries Act” enacted by the legislature of this state in 1859, or under the provisions of the Civil Code of this state

enacted in 1872 and amended thereafter. Most of the cemeteries incorporated under the Rural Cemeteries Act have availed themselves of the provisions of the Civil Code and have volutarily placed themselves thereunder as they have the right to do under section 288 of the Civil Code.

I mention this fact for the following reasons: The Rural Cemeteries Act contained the following language:

“But the proprietors of lots, or plats, in such cemeteries, their heirs, or devisees, may hold the same exempt therefrom, so long as the same shall remain dedicated to the purpose of a cemetery; and, during that time no street, road, avenue, or thoroughfare, shall be laid through such cemetery, or any part of the lands held by such association, for the purposes aforesaid, without the consent of the trustees of such association, except by special permission of the legislature of the state.”

Under this language it would appear that streets could not be opened through cemeteries organized under this Act and I understand that this claim has been made. It is my opinion, however, that there is no validity in this contention for the following reasons:

1. As to the cemeteries which have, as above mentioned, volutarily placed themselves under the operation of the Code, the Rural Cemeteries Act has been repealed. (See sections 287 and 288 of the Civil Code.)

2. As to the cemeteries that have not placed themselves under said Act, the provision above quoted has been repealed by an amendment to the Code passed at the last session of the legislature, which said amendment reads as follows, to-wit:

“An Act to amend section 10 of an act entitled ‘ an Act to authorize the incorporation of rural cemetery associations,’ approved April 18, 1859, and all acts amendatory thereof.

(Approved April 24, 1911.)

The People of the State of California, represented in senate and assembly, do enact as follows:

Section 1. Section 10 of an Act entitled ' An Act to authorize the incorporation of rural cemetery associations' approved April 18, 1859, and all acts amendatory thereof, is hereby amended so as to read as follows:

Section 10. The cemetery lands and property of any association, formed pursuant to this act, shall be exempt from all public taxes, rates, and assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors. But the proprietors of lots, or plots, in such cemeteries, their heirs or devisees, may hold the same exempt therefrom, so long as the same shall remain dedicated to the purpose of a cemetery.

Sec. 2. This act shall take effect immediately."

There was also passed at the last session of the State legislature an act providing as follows:

"An act relating to the opening of streets through cemeteries.

(Approved April 24th, 1911.)

The People of the State of California, represented in senate and assembly, do enact as follows:

Section 1. No streets, alleys or roads shall be opened or laid out within the boundary lines of any cemetery located in whole or in part within the lines of any city or city and county of this state, where burials have been had within five years prior thereto, without the consent of the corporation or association owning and controlling such cemetery."

No attention, however, need be paid to this act, as according to my information, no burials have been made in cemeteries within the City and County within five years. It has been contended that the portion of the Rural Cemeteries Act above referred to could not be repealed by the legislature of the state because of the fact of its being in the nature of a contract with cemeteries incorporated under this act. As to this, however, I would state:

1. The Rural Cemeteries Act was an act passed at the time the State of California was governed under the Constitution of 1849. Under the Constitution of 1849, Article IV,

Section 31 thereof, the right was given the legislature to form corporations under general laws, it being, however, particularly provided in said section, that all general laws passed pursuant to said section could be altered from time to time or repealed. Under this section the legislature had the right at any time to repeal the Rural Cemeteries Act or any portion thereof, thereby taking from corporations formed thereunder any rights granted them under said act.

Greenwood v. Union Freight Ry. Co. 26 L. Ed. 961; 105 U. S. 13.

Spring Valley Water Works v. Schottler, 28 L. Ed., 173; 110 U. S. 347.

Cafder v. Michigan, 54 L. Ed. 1163, 218 U. S. 591.

Furthermore I am convinced that the provisions of the Rural Cemeteries Act above quoted providing that streets could only be opened through cemeteries by special act, would not, so far as cemetery associations were concerned, constitute a contract between the cemeteries in the state so that the same could not be altered by the legislature or so that streets could not be ordered opened up under general as well as special acts. (See *Spring Valley Water Works v. Board of Supervisors*, 61 Cal. 3.)

I understand that the question has been raised as to whether or not the streets thus opened through cemeteries could be opened other than at the expense of the municipality. In other words, whether or not the expense of opening these streets can be met through assessments levied upon the adjacent property.

As to whether or not the machinery supplied by the charter provides for an assessment plan for the opening of streets such as can be advantageously employed in a case such as this, I do not now determine. I do desire to call the attention of your honorable Board to this matter so that you may consider it. There is a decided question as to legality and efficiency of the Charter plan for assessment, in order to meet the expense of opening streets. It is my opinion, however, that the city can, so far as the legal machinery at hand

permits, open the streets through the cemeteries by condemning, if necessary, the land taken for such purpose and by assessing all land in the neighborhood actually benefitted by the opening of such streets.

In rendering this opinion I am aware of the fact that the Rural Cemeteries Act provides, in Section 10 thereof, that

“The cemetery lands and property of any association formed pursuant to this act, shall be exempt from all public taxes, rates, and assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors. But the proprietors of lots or plats, in such cemeteries, their heirs, or devisees, may hold the same exempt therefrom, so long as the same shall remain dedicated to the purpose of a cemetery. * * *”

This exemption, however, in so far as the cemeteries that have availed themselves of this code provision are concerned (and again I repeat that I understand that most of the cemeteries in San Francisco organized under the Rural Cemeteries Act have availed themselves of this privilege) has been terminated by Section 288 of the Civil Code above referred to. As I have already said, all portions of the Rural Cemeteries Act were repealed and Section 288 did repeal all portions of this Act in its application to corporations coming under the code provisions. As to cemeteries incorporated under the Rural Cemeteries Act and not coming under the Code, this exemption from assessment has not been repealed.

As to the second part of your query concerning the power of the Board of Supervisors to cause the removal of the bodies and the abolition of the cemeteries in the City and County of San Francisco, I would state that there is already an ordinance in existence prohibiting further burials within the City and County of San Francisco. This law has been held valid by both the Supreme Court of the State of California and the Supreme Court of the United States.

In order absolutely to abolish cemeteries the next step of course would be to order the removal of the bodies therefrom. That the Board of Supervisors can do this at the pres-

ent time I believe is a fact. As a part of the police power under which the Board of Supervisors prohibited further burials they could also compel exhumation of bodies within cemeteries, provided, of course, such cemeteries are not too remote from human habitation or living human beings.

At the last session of the legislature there was enacted a law giving the Supervisors the right to order the removal of bodies. (See Chapter 577 Statutes and Amendments to the Codes of California, 1911). The Board of Supervisors, under this law, was given the right "by ordinance duly passed and under such rules and regulations which it may adopt" to provide for the exhuming, taking up and removal in cemeteries within the boundary lines of the City (and in which such cemeteries no interments of human remains have been made for a period of not less than five years) of any or all the human remains interred in such cemeteries. Certain conditions are embodied in this statute which it is declared must be contained in the rules and regulations to be enacted by the Board of Supervisors. These conditions are mainly the giving of notice to certain owners of lots within cemeteries. It is my opinion that, in all probability, without the enactment of this legislation the Board of Supervisors of San Francisco, under its general police powers, could have provided, for the exhumation of bodies within cemeteries. Under this legislation it certainly can so provide. There may be a question as to whether or not it is necessary for the Board of Supervisors, in any ordinance passed by it, to abide by the conditions set forth in said legislation for the giving of notice, etc., but I take it for granted that there is no reason why this question should be answered at the present time.

There is one provision in the Statute embodied in Chapter 577 which I do find it necessary, however, to discuss in giving this opinion. That provision is contained in Section 6 of Chapter 577, and reads as follows, to-wit:

"Nothing herein contained shall authorize the taking of private property without due compensation first made."

Under this section it might be considered highly improbable whether the exhumation of bodies could be insisted upon

by the municipality without first compensating the individual lot owners in which the bodies are interred. It is rather difficult to conceive of this section having been inserted in this Act knowingly and without intent to interfere with the operation of the act itself. For our purpose, however, we can ignore this section.

Under the police powers vested in the municipality the Board of Supervisors, as I have already stated, has the right to compel the removal of dead bodies from cemeteries. If the Board of Supervisors decide to enact a resolution demanding such removal they can do so under the general police powers vested in it under the state constitution and the charter. The Board of Supervisors, need not, in doing this, act under the provisions of Chapter 577. Section 6 of Chapter 577 applies only to the cases where the Board of Supervisors is acting under said Chapter 577. It declares only that nothing in said Chapter contained shall be considered as authorizing the taking of private property without due compensation first made. It does not provide that the Board of Supervisors may not under its police powers pass an ordinance not in conflict with Chapter 577 compelling the removal of dead bodies from cemeteries. The right of a municipality to enact ordinances pertaining to the same matter dealt with by state statutes can no longer be denied. (In re Hoffman 155 Cal. 114.)

Thus far I have considered only the proposition as to whether or not the Board of Supervisors would have the right to pass an ordinance calling for the removal of bodies. I have not discussed the proposition as to whether or not the Board of Supervisors has the power to enforce the removal of bodies so that the expense thereof will not be borne by the municipality. As to this matter I would say that I find great difficulty in answering it. I can find no authority directly in point. However, I believe that if your Honorable Board finds and declares the cemeteries to be nuisances on the grounds of public health and welfare or similar grounds, then your Honorable Board could order the removal of bodies therefrom and after proper notice given and failure to re-

move said bodies that the City could proceed to remove such bodies and charge the expense thereof to the property.

The State legislature would undoubtedly have the right as an exercise of its police powers to authorize the City to do this in case of nuisance.

Wickerson v. City of Boston, 131 Mass. 306;

In re Tappan, 36 How. Pract. 390;

City Council of Charleston v. Werner, 38 So. Car. 488.

In this State, however, the police powers vested in a municipality are co-extensive with the police powers of the State except that in case of conflict the State would control. (Odd Fellows Cemetery Assn. v. City of San Francisco, 140 Cal. 226).

Therefore, if the State, under its police powers can remove bodies from the cemetery and charge the same to the property the City can do likewise. Undoubtedly under the cases above set forth with additional legislation, this can be done, but without such legislation it is my opinion that it can likewise be done.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Petition of Certain Nurserymen to Create the Position of County Horticultural Commissioner Defective.—The duties of Such Officer not Assigned to Board of Health.

June 3rd, 1912.

Gentlemen: I am in receipt of your request for an opinion as follows:

“By direction of the Public Welfare Committee of the Board of Supervisors, I enclose herewith copy of a petition from H. Plath and other florists and nurserymen, stating that certain nurseries in San Francisco are infested with insects injurious to fruits, plants and vegetables, and requesting

the appointment of a County Horticultural Commissioner in accordance with Section 2322 of the Political Code, entitled —“An Act relating to the County Commissioner of Horticulture.”

Will you kindly advise the Committee as to whether or not the City and County of San Francisco, in view of the filing of this petition, is obliged to create the position of County Horticultural Commissioner as per Section 2322. Could the Board if it so desired, assign this duty to the Department of Public Health without the creation of this new position?”

“To the Honorable,
The Board of Supervisors,
San Francisco County, California.

Gentlemen: We the undersigned, residents, freeholders and possessors of an orchard, or greenhouse, or nursery, within the City and County of San Francisco, hereby state that certain nurseries or greenhouses within the City and County of San Francisco, are infected with serious infectious diseases or insects injurious to fruit, fruit trees, vines and other plants and vegetables.

AND WE THEREFORE petition your Honorable Board, that in accordance with Section 2322 of the Political Code of the State of California, a County Horticultural Commissioner be appointed for the City and County of San Francisco.

H. Plath, 510 Wyoming Ave., and 27 others.”

Opinion.

The Act of the Legislature of March 25th, 1911, to which you refer (Stats. 1911, p. 490) embraces Section 2322, 2322a, 2322b, 2322c 2322d and 2322e of the Political Code of this State. It provides that “whenever a petition is presented to the Board of Supervisors of any county, or city and county, and signed by twenty-five or more persons each of whom is a resident free-holder and possessor of an orchard, or greenhouse, or nursery, stating that certain or all orchards, or nur-

series or trees or plants of any variety are infested with any serious infectious diseases, or insects of any kind injurious to fruit, fruit trees, vines, or other plants or vegetables * * * and praying that a commissioner be appointed by them, whose duties shall be to supervise the destruction of said insects, diseases * * * as herein provided," thereupon the Board of Supervisors is required to immediately appoint a commissioner from a list of names furnished to it by the State Board of Horticultural Examiners. The term of this County Horticultural Commissioner is fixed, his duties are clearly prescribed, his compensation is provided for and he is given the power to divide the county into districts and to appoint a local inspector for each of said districts, and with the consent and approval of the Board of Supervisors to appoint a deputy horticultural commissioner. The compensation of said deputy and inspectors is also provided for. All of these costs are made chargeable against the county treasury.

This Act is the last expression of the Legislature on this subject. The prior similar Acts were, first, the Act of March 14, 1881, (Stats. 1881, p. 86); second, the Act of March 19, 1889 (Stats. 1889 p 413); third, the Act of March 31, 1891, (Stats. 1891, p. 268); fourth, the Act of March 31, 1897 (Stats. 1897, p. 244).

While this Act of 1911 and some of the other similar Acts above set forth have been considered by the Courts of this State, and have been upheld, we find no case in which the point was raised as to the constitutional power of the state legislature to delegate from itself to a certain number of private citizens, having the qualifications mentioned, the authority, by their merely stating in a petition presented to the Board of Supervisors that certain orchards or nurseries or trees or plants are infested with certain diseases, to make it mandatory upon the Board of Supervisors to appoint a county horticultural commissioner. In my opinion this is a question of considerable seriousness. I am not prepared at this time to advise that the legislature cannot so delegate to

private individuals this power of exercising their discretion in determining the necessity for appointing such county horticultural commissioner. However, it appears to me to be a very serious question and for that reason I would advise that if your Board wishes a determination as to whether you are compelled under this law to comply with the petition, that the case be brought before the court by a refusal on your part to comply. This would make a test case which would determine the question. However, if, upon investigation your Board should determine that, in the exercise of its judgment, it desires to appoint such county horticultural commissioner, then it may of course, consider the statute as not being mandatory, but rather, as vesting a discretion in your Board. Your Board may then if it wishes, exercise this discretion by appointing such county horticultural commissioner which power your Board undoubtedly has, reserving the question as to whether the statute is mandatory for such time as your Board may be of the opinion that no such commissioner is necessary. Any such appointment, however, should state in definite terms that the office is to be held subject to the office being declared vacant at the pleasure of your Board.

In my opinion, however, the petition presented should be in more specific form than is the copy of petition which you have forwarded to me. That is, this petition merely follows the general language of the statute. I believe that it should describe each petitioner as a resident and freeholder and the possessor of an orchard, or a greenhouse, or nursery within the City and County with its location and further that the petition should state the location of the orchards or nurseries or trees or plants within the City and County that are infected with serious or infectious diseases or insects injurious to fruit, fruit trees, vines or other plants or vegetables, and what these infectious diseases or insects may be. Or, that all orchards or nurseries or trees or plants, in general, are so infected. That is, if we treat this statute as vesting discretion in your Board, there must be some definite information

presented to your Board, either in this or some other form, upon which your Board may act.

Concerning your inquiry as to whether the Board could assign this duty to the Department of Public Health without the creation of this new position, I find nothing in the Charter chapter on the Board of Health which contemplates any such scope of work as contemplated in this statute, being cared for by that Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Public Welfare Committee,
Board of Supervisors.

**Powers of Board of Supervisors Relating to Spring Valley
Extensions into Portions of City Unsupplied with Water.**

June 4th, 1912.

Gentlemen: I am in receipt of a letter from the Clerk of your Board requesting my advice as to the legality, power and limitations of your Board to act upon a resolution presented to the Board by one of its members. Such letter further requests that my opinion be given seriatim, informing the Board of what its powers and limitations are in each instance.

The resolution reads as follows:

Whereas, It is absolutely necessary that immediate legislative-steps be taken to provide for a water supply for parts of this City and County now unsupplied and suffering much because of the refusal of the Spring Valley Water Company to make the necessary extensions; therefore be it

Resolved, That his Honor, the Mayor, in conjunction with the Advisory Committee on Water Supply, whose appointment was authorized by this Board, be requested to consider the following proposals as a means of relieving this situation

and assisting in the upbuilding of these districts by supplying them with water;

First. An agreement with the Spring Valley Water Company to make the necessary extensions to these districts, the said City, through this Committee, agreeing to purchase later these extensions at a fair valuation;

Second. The sale of \$2,000,000 Water Supply Bonds to lay mains or pipes and construct necessary reservoirs, said mains and pipes to connect with the Spring Valley Water System and to be later a part of the municipal distributing system;

Third. If the above is found legal and practical, the Committee is also to recommend an agreement with the Spring Valley Water Company to supply water through these extensions, and in this connection it is also to seek an agreement on the part of the company to eliminate the usual \$10.00 service charge;

Fourth. Mandamus proceedings either direct on the part of the City, or by co-operation with the office of the Attorney-General and the Public Utilities Commission for the purpose of forcing these extensions, or inflicting the necessary penalties for failure to do so;

Fifth. The institution of condemnation proceedings on behalf of the City and County to take over the property of the Spring Valley Water Company."

Opinion.

At the outset it should be observed that neither the Mayor nor the Advisory Committee on Water Supply is vested with any power to make a binding agreement on behalf of the City. Such agreement, if made, must be authorized by ordinance of your Board. The power of the Mayor and the Advisory Committee is limited to recommendations of your Board of such measures as in their judgment are proper to meet the conditions described in the preamble of the resolution.

First and Second Proposals of Resolutions.

Any agreement between your Board and the Spring Valley Water Company for the making of extensions by that Com-

pany and the subsequent purchase thereof by the City must necessarily depend for its validity upon the question as to whether or not any fund is or will be available for the purchase of such extensions. Unless specific provision is made in the budget for such a fund to be taken out of the current revenues, the only means of payment for such a purchase would be through funds derived from a bond issue. As to a fund to be provided in the budget, such a fund could only be provided in the next budget, for the Board of Supervisors under limitations of the Charter, cannot enter into a binding contract, the execution of which depends upon the expenditure of money to be raised in a year subsequent to the fiscal year in which the contract is made. The question as to whether or not such extensions can be paid for by the sale of a portion of the water supply bonds already authorized depends upon whether or not the additional pipes, when laid, can be considered as a portion of the Lake Eleanor and Tuolumne Water Supply system authorized by the voters of San Francisco at the special election held on January 14th, 1910.

In an opinion rendered to your Board on October 20th, 1911, I advised that no portion of the proceeds of these water supply bonds could be used for the laying of pipes or mains in any portion of the City "unless such pipes and mains be integral parts of the Lake Eleanor and Tuolumne Water Supply;" and that "whether such work would be a part of that proposition is a matter for you to be advised upon by the City Engineer." If the pipes proposed to be laid constitute a portion of that proposed system the funds arising from the sale of those bonds may be used for the purpose of the laying of those pipes; otherwise not.

Whatever the City may do directly with regard to the construction of this water supply system, it may do by contract with the Spring Valley Water Company or any person or corporation. It would, therefore, be in the power of the Board of Supervisors to enter into an agreement as suggested in the first proposal of the resolution if the pipes when purchased shall form an integral part of the Lake Eleanor or

Tuolumne Water Supply System or if the pipes when purchased are to be paid for by a fund now available, whether from the proceeds of a bond sale or of ordinary taxation.

Third Proposal of Resolution.

With regard to the third proposal of the resolution, it is perfectly proper for the Committee to recommend any agreement with the Spring Valley Water Company which, in its judgment, is advisable, and, as the agreement referred to in the resolution would be a favorable one to the City, there would be no objection to entering into the same.

Fourth Proposal of Resolution.

With regard to the fourth proposal of the resolution, the question as to the power of the City to compel the Spring Valley Water Company to extend its system is discussed in an opinion rendered your Board by this office on February 27th, 1911, in which it is stated that no exact authority can be found upon this particular question. That opinion recommended that your Board direct that an action be brought by this office to test that question. Since the rendition of the opinion above referred to the Constitution of the State has been amended and the powers of the Railroad Commission enlarged so that the Commission is now vested with large power as a public utility commission in control of all public utilities of the State except as limited by such control as is still vested in municipalities and other bodies.

Section 36 of the "Public Utilities Act" provides, in substance, that the Railroad Commission may, in order to secure adequate service or facilities, make and serve an order directing that additions or extensions to an existing plant shall be made in the manner specified in such order.

Section 23 of Article XII of the Constitution, as amended last year, provides that all powers respecting public utilities vested in Boards of Supervisors, etc., shall cease so far as such powers shall conflict with the powers conferred by that section upon the Railroad Commission; provided, however,

that the control over public utilities which was vested in any city or city and county at the time the constitutional amendment took effect should be retained by such city or city and county unimpaired, unless the electors thereof should vote to surrender the same to the Railroad Commission. Under this constitutional provision the City of San Francisco still has the power to compel the extension of the system of the Spring Valley Water Company, provided, that such power was vested in it prior to the amendment of the Constitution; and provided further that such power has not been revoked by the further amendment to the Constitution hereinafter referred to. If, however, such power was not vested in the municipality at that time it is now vested in the Railroad Commission, subject to the uncertainties arising from the same constitutional amendment hereinafter referred to.

The extent of the exercise of this power, either by the municipality or the Railroad Commission, is complicated, however, by the recent amendment to Section 19 of Article XI of the Constitution. The effect of this latter amendment is discussed in an opinion rendered your Honorable Board by this office on January 15th, 1912. It was there held that the amendment above referred to operated as a withdrawal of the privilege of the use of city streets by public service corporations, except as to such streets as had actually been used prior to the adoption of the amendment. This view was based upon the theory that the franchise acquired by a public service corporation for the use of the streets was measured by the extent of the use which had been made of the streets, and that no franchise had been acquired in streets which had not been actually used. As to these latter streets the privilege of acquiring a franchise by use was extended by the Constitution prior to the recent amendment, but that privilege was withdrawn by the amendment. After the adoption of the amendment the privilege could be enjoyed only "upon such conditions and under such regulations as the municipality may prescribe under its organic law." The question as to whether or not your Board, as the legislative body of the city, may vary these conditions and regulations or waive the

necessity of applying for and obtaining a franchise, under the charter provisions in order to meet the public necessity for the extension of present water supply, is not free from doubt. If extensions are now to be made either by the water company voluntarily or under the compulsion of a writ of mandamus, they must be so made under some conditions to be prescribed by your Board. The exact nature of these regulations will depend largely upon the construction given by the Supreme Court to the recent amendment to Section 19 of Article XI of the Constitution. That question is now before the Court in the case of *ex parte Russell* which arose in Los Angeles, but in which case my office has appeared as **amicus curiae** and on behalf of the City and County of San Francisco, and filed a brief under permission of the Court on May 15th, 1912. A decision is expected in this case in the near future, which, when rendered, will contain an authoritative interpretation of the constitutional amendment last above referred to. In view of the uncertainty existing in this matter until the Supreme Court shall have passed upon the question, it would, in my judgment, be unwise to take any further action to determine the City's powers until after the decision is rendered in *Ex parte Russell*, above referred to. After the rendition of that decision I shall be pleased to advise you further as to a course of procedure to be adopted in attempting to compel extensions of the present water supply system.

Fifth Proposal of Resolution.

Referring to the fifth paragraph of the resolution, the City and County of San Francisco undoubtedly has power to institute and prosecute to a determination condemnation proceedings for the purpose of acquiring the property of the Spring Valley Water Company.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Insufficiency of Check Accompanying Bids for Yearly Supplies.. Board May Reject Any and All Bids.

June 7th, 1912.

Gentlemen: I am in receipt of your communication of the 7th inst., requesting my opinion upon the following facts:

Your committee received bids for supplying yearly supplies and materials for use of and services for the various officers, offices, departments and institutions of the City and County of San Francisco during the fiscal year commencing July 1st, 1912, and ending June 30th, 1913. Your committee received seven bids from various persons and firms to supply forage and among the bids so received was one from J. O'Keefe & Co., No. 2160 Folsom Street. Said bid was accompanied by a certified check in the amount of \$5000 drawn on the Mission Bank.

It appears that the check accompanying said bid does not comply with Section 1, Chapter III, Article II of the Charter which provides that all proposals shall be accompanied with a certificate of deposit or certified check on a solvent bank in the City and County of **ten percentum** of the amount of the bid, in that it is less than ten per centum of the aggregate of the bid submitted by J. O'Keefe & Co.

In line with former opinions of this office said bid must be rejected by your Board. See published opinions of the City Attorney 1908-9, wherein I advised the Board of Education as follows:

“The requirements of the Charter that bids shall be accompanied with a certified check is for the protection of the City in case the bidder refuses to enter into the contract after an award has been made to him. No bid may be received unless the bid is regular in all particulars. Nothing can be done either by the bidder or by the Board to make a bid that is irregular, regular after it has been filed. The bid must fall or stand as it has been presented.”

See also opinions of the City Attorney, page 378.

Your Committee also desires to be advised as to whether or not it has the power to reject all of the bids submitted for forage and to advertise anew for bids. In my opinion the Board of Supervisors has the power and authority to do so.

As I stated in the opinion at page 492 of the published opinions of the City Attorney.

“It is unfortunate that a bidder should lose a favorable contract by reason of an irregularity in his proposal and that the city should lose the advantage of a favorable contract for the same reason. The provisions of the Charter, however, are mandatory and there is no course for your Board to pursue but to follow strictly the provisions of the Charter in these matters.”

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Duty of Board of Health to Enforce Certain Sections of State Tenement House Law.—Duty of Board of Works to Enforce Other Sections Thereof.

June 10th, 1912.

Gentlemen: I am in receipt of your communication of June 10th, which reads as follows:

“At a meeting of the Board of Health held on June 4th, I was directed to request you to inform the Board of Health if it is mandatory for this Department to enforce those sections of the State Tenement House Law, amended 1911, as refers to Health Department.

If it is your opinion that it is mandatory that this Department should enforce the State Tenement House Law, what procedure should we adopt. The Board of Supervisors failed to appropriate the sum of \$3180 in the budget for 1912-13 to employ the following inspectors:

1 Tenement House Inspector (Male) to examine plans pertaining to sanitation, inspect buildings in course of construction and to issue certificate when premises are ready for occupancy.

1 Inspector (Female) to inspect tenement houses after occupancy."

In reply to the first question, it is my opinion that it is the duty of the Board of Health to enforce those sections of the State Tenement House Law, as amended in 1911, which refer to the Health Department. The State Tenement House Act attempts to control (1st) the construction of tenement houses, and (2nd) their occupancy. In other words, the law directs as to how a tenement shall be constructed and as to how it shall be occupied.

The duty of the Board of Public Works, under the law, extends only to requiring that a tenement house shall be constructed in accordance with the Act and when a tenement house has been constructed in accordance with the Act, the duty of the Board of Public Works ceases. When it comes to the occupancy of the building, that is a matter which is under the jurisdiction of the Board of Health and it is the duty of the Board of Health to see that a tenement house is not occupied contrary to the provisions of the Act.

An examination of the Act will show that there are many sections of the Act which relate solely and purely to the occupancy of a tenement house after it has been constructed.

As to the second question; what procedure you should adopt, that is a matter for the determination of the Board of Public Health. The Board should, under the duty imposed upon it by the Act, adopt such a procedure as will carry out the intents and purposes of the Act, namely, that a tenement house shall not be occupied contrary to the express provisions of the Act. It would seem to me that to carry out the provisions of the Act it would be necessary for the Board to employ inspectors of tenement houses for the reason that it is only an investigation of actual conditions that can determine whether or not the law is being violated. In addition,

the law requires an occupancy permit from the Board of Public Health and only an inspection of the premises can determine whether or not the permit should be issued.

If your Board is not provided with sufficient funds with which to carry on the work of inspection then of course you are relieved of the responsibility. I cannot suggest what steps you should adopt in that connection for the Board of Supervisors have full power in the matter of making appropriations to the Department and the judgment of the Supervisors as to the total amount to be allowed for salaries is final.

Respectfully,

PERCY V. LING,
City Attorney.

Board of Public Health.

**Sub-Sidewalk Areas—City May Exact a Rental From Those
Areas When the City Owns the Fee of the Street.**

June 10th, 1912.

Gentlemen: I am in receipt of your communication as follows:

“I am directed by the Committee on Public Buildings of the Board of Supervisors, to transmit the enclosed copy of a proposed Bill and Ordinance, entitled “Imposing a charge for the use of sub-sidewalk areas in the public streets of the City and County of San Francisco,” with the request that you furnish an opinion as to the validity of said proposed ordinance, and also, if the City has the power to exact a rental, a license or tax charge from owners of the buildings or occupants thereof enjoying the use of such sidewalk space.”

Opinion.

On March 28th of this year, I rendered an opinion to your Honorable Board, advising you therein, among other things, that the jurisdiction of the municipality extended over the

streets of this City from property line to property line. I pointed out, however, the fact that there were two great classes of streets in this City; 1st: Those which had been set apart on land owned in fee by the proper owners, and 2nd: Those which have been dedicated, whether by deed, or more generally, by the filing of a map upon which streets are delineated, reserve unto themselves the title to the fee thereto.

The right and power of the City and County, to make and enforce an ordinance imposing a rental on the sub-sidewalk space, as provided in the proposed ordinance, is absolute, subject, however, to the distinction to which I called your attention in the former opinion, and to the exercise over those streets only, the fee in which is in the City and County of San Francisco. The principle here enunciated has been upheld by the Courts of the State of Illinois, in the consideration of an ordinance of the City of Chicago, similar in effect to the one proposed here.

Certain property owners of that City contested the right of Chicago to enforce the ordinance. The first case is that of *J. Burton, Co. v. City of Chicago*, 86 N. E. 93; 236 Ill. 383. The Supreme Court upheld the ordinance, but the decision went off on the construction of the language of a section thereof, which did not affect the ordinance in any way, except to make certain that which was uncertain in said section.

On October 28th, 1910, the Supreme Court of Illinois decided four cases upholding the Chicago ordinance, viz:

Tacoma Safety Deposit Co. v. City of Chicago, 93 N. E. 153.

Sears v. City of Chicago, 93 N. E. 158;

Ryerson v. Chicago, 93 N. E. 162;

Williams v. Chicago, 93 N. E. 165.

In the first case, the Court, after deciding that the fee in a certain street was in private ownership, proceeds as follows:

“It is contended by the defendant that the city, regardless of where the fee in the streets adjoining complainant’s prop-

erty is held to rest, under the power of the city to control its streets, had the right to pass the ordinance hereinbefore referred to, and to enforce the same as against the complainant. The right of the city to control its streets cannot be doubted, so long as it uses its streets for the purpose for which they have been dedicated. If, however, the city authorizes the use of its streets for a purpose other than that for which they have been dedicated, it exceeds its power; and the decisions of this court clearly establish that there is a distinction between the interests of the abutter on a street in which the fee rests in the city and on a street in which the fee rests in the adjoining owner. To illustrate: An abutter under a statutory dedication cannot enjoin a steam railroad company from using the street, while an abutter under a common-law dedication and in whom rests the fee of the street may enjoin such use, even though a franchise has been granted by the public authorities to the railroad company. In a case where the fee is in the city, it would not be an unlawful diversion of the use of a street to permit a vault or other similar underground structure to be erected beneath the street, which structure did not interfere with the purposes for which the street was dedicated, and the city would not be estopped from requiring the space occupied by such structure to be surrendered to the city whenever it became necessary to remove the structure for the uses of the public. *Gregsten v. City of Chicago*, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496; *City of Chicago v. Norton Milling Co.*, 196 Ill., 580, 63 N. E. 1043. To permit, however, such a structure to be erected in a street where the fee of the street rests in the abutting owner, and to require the abutting owner to pay rent for the use of such space, would be to impose an additional burden or servitude upon the fee, and would be unlawful. It is clear, therefore, to provide for the erection of a subway beneath the sidewalk and in a street adjoining the property of the abutter, where the fee in the street is in the abutter, and to require the owner of the fee to pay rent to the city, for the use of his own property would be, in effect, to take from the owner his property without due process of

law, or without paying him due compensation therefor, under the claim of regulating the use of the streets of the city, which would amount to an unlawful deprivation of the abutter's property, which the law would not permit.

The contention is made by the complainant that the city is without power to pass an ordinance requiring persons who use subways beneath sidewalks adjoining their property to pay compensation for the use of such space. The position of the complainant, we think, is well founded as to subways beneath sidewalks in streets of which such persons are the owners in fee; but as to subways beneath sidewalks in streets in which the fee is in the city or in the state, and which are held for the use of the city, we do not think this is true. In the *Gregsten* case and in the *Norton Milling Co.* case the right of the City of Chicago to confer, by contract, upon a private individual or corporation the right to use space beneath the public streets of the city was recognized. If the city has the power to contract for the use of space beneath the public streets of the city, we see no reason why it cannot provide for such use, and regulate the manner of such use and the compensation that shall be paid for such use, by ordinance, in those streets in which it holds the fee, subject at all times to the right to reclaim the portion of the street then in use when the necessities of the public may require."

In the second case the Court said:

"Whatever may be the rule in other jurisdictions, the law is settled in this state that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held. *Nelson v. Godfrey*, 12 Ill. 20; *Gridley v. City of Bloomington*, 68 Ill. 47; *Chicago & Northwestern Railway Co. v. People*, 91 Ill. 251; *City of Quincy v. Bull*, 106 Ill. 337; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Gregston v. City of Chicago*, 145 Ill. 451, 34 N. E. 426; 36 Am. St. Rep. 496; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327; *Dillon on Mun. Corp.* 541-551. And it is equally

well settled that the city may regulate such use and fix a reasonable compensation to be paid for the same. *McCarthy v. City of Chicago*, 53 Ill. 38; *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1043; *Lobdell v. City of Chicago*, 227 Ill. 218, 81 N. E. 354. The power of the municipality in this regard in cases where it owns the fee in its streets is subject to no limitation, except that its exercise shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated. In cases, however, where the municipality only has an easement in its streets and the fee remains in the abutting land owners, the relative rights of the municipality and the abutting land owners are to be determined under entirely different rules of law. When private property is taken for public use, the general rule is that it can only be taken to the extent that the public use to which it is to be applied requires. A law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use." * * * "The abutting land owner, thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the enjoyment of the easement which is held for the use of the public. 3 Kent's Com. (12th Ed.) 433; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Tucker v. Tower*, 9 Pick. (Mass.) 109, 19 Am. Dec. 350. It is as unreasonable as it is illogical to say that the abutting lot owner who owns the fee in a street, subject only to the easement of the public, must pay the city for the privilege of using his own property in a manner that in no way interferes with or disturbs the full enjoyment of the easement.

It follows, we think, from the foregoing principles of law, that the validity of the ordinance involved cannot be questioned when applied to the owners of lots located upon streets in which the city owns the fee, and it is equally clear that the ordinance cannot be forced against the owners of lots abutting upon streets wherein the city has only an easement."

In the third case, the opinion of the Court was directed to deciding whether or not the plaintiff owned the fee in the street and therefore would not be compelled to observe the ordinance, and in the last case the court also passed upon the subject of the ownership of the fee in a certain street. All the decisions held that the ordinance was valid when applied to streets in which the city owned the fee but could not be enforced as against the abutting owner who owned the fee in the street, the city only having an easement therein.

I have shown that the city has the power to adopt and enforce the proposed ordinance, subject only to the restrictions as herein shown. The question of whether the city can, under such ordinance, exact a rental, a license, or tax charge from owners of the buildings or occupants thereof now enjoying the use of such sidewalk space must be answered in the affirmative, also subject to the same restrictions. The power was upheld in the case of *Tacoma Safety Deposit Co. v. Chicago*, supra, the Court saying:

“It is also urged that the city, having granted to the complainant a permit to construct its building upon its premises according to plans and specifications which provided for the construction of subways beneath the sidewalks adjoining its premises, is now estopped to deny the right of the complainant to maintain said subways upon the property of the city free of charge. It is too clear for argument, we think, that the city had the right to regulate the construction of complainant's building at the time it was erected; and the fact that it may, through its building department, have approved certain building plans which were submitted to it by the complainant, and granted to it a permit to construct its building, we think obviously did not estop the city afterwards to require the complainant to pay for the use of the city's property, which its building in part occupied, or to remove its building, or the part thereof which rested upon the city's property. The complainant, at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its building, which license could be revoked by

the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of space beneath the sidewalk in the street which belonged to the city. We do not think the cases of *Gridley v. City of Bloomington*, 68 Ill. 47, *Gregston v. City of Chicago*, supra, and *City of Chicago v. Norton Milling Co.*, supra, are in conflict with this view. In each of those cases contractual relations were held to exist between the parties which were binding upon them, while in this case the most that can be claimed by the complainant is that it was granted a permit by the city to erect its building. At the time it took out this permit, it had full knowledge of all the facts, and obviously was not misled by the city. The doctrine of estoppel, we think, has no application to the case at bar."

In the case of *in re Newell*, 2 Cal. App. p. 767, the court considered an ordinance of Los Angeles, which made it unlawful to erect or maintain any tent or movable structure within the fire limits. It was contended that the custody of the petitioner, under an arrest for the violation of said ordinance was unlawful, because the structure maintained by him was a tent house in which he was, at the date of the passage of the ordinance, engaged in business.

The Court said:

"The police power of a city is derived from the constitution (article XI, section 11), and not alone from the charter. The subject matter of the ordinance is referable to the police power. In order to protect the property of all the citizens from the ravages of fire (the council) may establish fire limits, and regulate or prevent the use of wooden buildings within such limits; and although this may disturb the enjoyment of the rights of an individual he is, in contemplation of the law, compensated by sharing the general benefits derived from it." (Ex parte Fiske, 72 Cal. 127, (13 Pac. 310); Ex parte Lacey, 108 Cal. 330, (49 Am. St. Rep. 93, 41 Pac. 411). The legislative body, being the sole judge of the necessities for regulation, the same, on its face being reasonable, will be so presumed. (In re Smith, 143 Cal. 370, 77

Pac. 180.) "It is settled law that all property is held subject to the exercise of police power, and that the provisions of the constitution, * * * declaring that property shall not be taken without due process of law, have no application in such cases." (Odd Fellows' Cem. Assn. v. San Francisco, 140 Cal. 235, 73 Pac. 987). This ordinance is in no sense class legislation. It applies to all persons similarly situated."

As to the necessity or expediency of enacting an ordinance imposing a rental upon sub-sidewalk area, that is of course, a matter over which I have no control. It is a question to be determined solely by your Honorable Board in the exercise of the discretion vested by the Charter in the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Supervisors May Permit Installation of a Private Pump at Relief Home to Supply Water from Lake Honda to Private Consumers—Restrictions.

June 13th, 1912.

Gentlemen: I am in receipt of your communication of the 7th instant as follows:

"I have been directed by the Public Health Committee of the Board of Supervisors to request you to furnish an opinion on the legal right of the Board to grant permission to The Noble Jones Company to install a pump in the pump house on the Relief Home tract, for the purpose of pumping water from Lake Honda to a tank to be installed at Twelfth avenue and R street. The pump will be used to supply water to private consumers in a district not covered by the mains of the Spring Valley system and will be installed without expense to the city. The applicant promises to keep the pump

in repair, but asks that the employee who attends to the Relief Home pumps be permitted to take charge of it.

Superintendent Wollenberg of the Relief Home is in favor of permitting the installation of the pump but feels that it should become the property of the city, as the expense of operating it and keeping it in repair would be nominal.

Opinion.

The tract of land now used by the Relief Home was purchased by the City of San Francisco from Pioche & Parsons in 1866 and is owned in fee by the City and County of San Francisco as the successor of the City of San Francisco, in its proprietary capacity, and is not burdened with any restrictions as to its use as it would be if dedicated for a particular purpose or use.

The use, therefore, of a portion of the pump house on the Relief Home Tract would not be in violation of the terms of a trust, for no trust exists in relation thereto, and so this question must be answered from the standpoint of the power of the municipality to permit the use of part of its property, held by it in its proprietary and not governmental capacity, for a private purpose, or rather allowing an employee of the city to perform services for a private person or corporation.

I have been unable to find a precedent on this subject, but it appears to me that if the pump sought to be placed in said pump house, together with the pipe or pipes leading therefrom upon the Relief Home Tract, were given to and became the property of the City and County, no rights of the City would be impaired, especially in view of the fact that the installation of said pump would increase the efficiency of the pumping plant at the Relief Home.

From your communication it appears that Superintendent Wollenberg is in favor of permitting the installation of the pump and inasmuch as it would entail no extra expense to the City to operate it and the keeping of it in repair would be nominal, I would suggest that the Board of Supervisors adopt

a resolution, granting permission to the Noble Jones Company, during the pleasure of the Board of Supervisors, to install said pump upon the condition that it, and the pipe or pipes leading therefrom on the Relief Home Tract, be given to the City, the City assuming the obligation of operating same and keeping it in repair.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

**Statute of Limitations Runs Against Application for Pension
Under the Charter—3 Year Limitation from Happening
of Event.**

June 21st, 1912.

Gentlemen: I am in receipt of a communication from your Board, requesting an opinion as to whether or not the Statute of Limitations runs against an application for a pension under the provisions of Article VIII, Chap. X of the Charter.

This section provides for the payment by the Board of Trustees of the Police Relief and Pension Fund to the dependent relatives of a police officer killed while in the performance of his duty "a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death."

The period prescribed for the commencement of an action is three years "upon a liability created by the statute, other than a penalty or forfeiture." (Code Civil Procedure, Section 338, 1.)

That a municipal charter is a statute, within the meaning of this section, was definitely decided in the case of *Frick v. City of Los Angeles*, 115 Cal. 512. In that case the court used the following language:

"We are * * * clearly of opinion that the charter, (of Los Angeles) to the extent of its purposes as a scheme of

municipal government, is a "Statute" * * * it is undoubtedly a law, though of local operation; the constitution declares it to be the organic law of the city; (Const. Art. XI, Sec. 8) it is of course a written law, and for many purposes the terms "Statute" and "written law" are used indifferently."

Since this pension is a liability created by statute, and the Charter has been held by our Supreme Court to be a statute, the Statute of Limitations will run against any such liability.

That the statute begins to run simultaneously with the event under which the liability accrues, and not with the formal demand for the pension, has been held in the very recent case of *Wittman vs. Board of Police Commissioners*, in a decision rendered by the District Court of Appeals for the First Appellate District on June 1, 1912.

In that case the plaintiff was dismissed from the Department on March 24, 1905. On March 20, 1908, he demanded to be reinstated. The demand being refused, suit was filed April 9, 1908, more than three years after the dismissal. The plaintiff contended that the Statute did not run until demand was made in March, 1908.

The Court held:

"These contentions bring the case within the rule followed and recognized by many cases, that where a writ has accrued except for some demand to be made as a condition precedent to legal worth which the claimant can at any time make if he so chooses the cause of action has accrued for the purpose of setting the Statute of Limitations running. *Harrington v. Home Life Company*, 128 Cal. 531; *Union Savings Bank of San Jose v. Leiter*, 145 Cal. 696; *San Luis Obispo v. Gage*, 139 Cal. 398; *Barnes v. Glide*, 117 Cal. 1.

Otherwise, as is pointed out in the cases already cited, he might indefinitely prolong his writ and enforce his claim or writ neglecting to make demand until it suited his convenience to do so."

You are therefore advised:

(1) That the Statute of Limitations runs against claims for police pensions under the Charter.

(2) That in such cases the Statute runs from the date of death, not from the date of demand for the pension.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

Disposition of Money and Other Personal Effects Found Upon Those Committed to Insane Asylum.

June 21st, 1912.

Sir: I am in receipt of your communication of the 18th inst., wherein you request to be advised as to your duty concerning the money or other personal effects of those persons who are committed to the State Institution for the Insane, said money and effects being retained in the custody of the Police Property Clerk's office and a receipt being given to the person from whom it was taken at the time of his apprehension.

It appears from your communication that requests are made of you by the heads of the various state hospitals to deliver to them any money or other personal property which the person committed may have had at the time of his arrest or detention.

Opinion.

The duty of the Sheriff in respect to the money found on the person of anyone who may be committed to any state hospital, at the time of his arrest, is defined in Section 2171 of the Political Code, which provides that the judge, after examination, etc., must adjudge a person insane and make an order that he be confined in a hospital for the care and treatment of the insane. The section proceeds to specify the

contents of the judgment of insanity and order of commitment of insane persons, and the last paragraph of said order is as follows:

“The sum of —— dollars having been found on the person of said person at the time of h— arrest, the said sheriff is ordered to take possession of the same and deliver it to the medical superintendent of said institution with the said insane person.”

This is a judgment and order of the Judge of the Superior Court and is binding not only on the Sheriff, as a direction and order to him, but upon any person or persons, whether officials or not, who may have said money, and the duty is imposed upon the Sheriff thereby to make demand on said person or persons to deliver the same to him in accordance with said order, upon the presentation of a certified copy thereof. Failure or refusal on the part of said person or persons to comply therewith should be immediately reported to the Judge, who made the order, for his consideration and such action as he may deem proper.

Section 2172 contains a provision that the money found on the insane person at the time of his arrest must be certified to by the Judge and sent with such person to the hospital to be delivered to the Medical Superintendent.

There is no provision of law concerning any personal property of an insane person, or making it the duty of the Sheriff to take possession of his personal property, other than money.

Section 2179, however, provides that the Secretary of the State Commission in Lunacy may, in the event that the insane person has any property, real or personal, and has no guardian, apply to a court of competent jurisdiction for letters of guardianship, and he would be authorized under such letters of guardianship to demand and receive any property of the insane person from any person who might have the custody thereof.

You are advised:

1st. That in respect to the money of patients committed to the state hospitals, the order of the Court referred to herein-

above is your warrant for taking said money into your possession and delivering the same to the Medical Superintendent.

2nd. That you have no duty to perform in respect to any other personal property of said patients, the duty of recovering the same being imposed by law upon the Secretary of the State Commission in Lunacy.

Respectfully,

PERCY V. LONG,

City Attorney.

Sheriff.

When the Board of Public Works Enters into a Contract for Street Work With the Agent of What is Claimed by Affidavit to be a Majority of Owners and of Frontage—Contract Final as to Another Contractor.

June 21st, 1912.

Gentlemen: I am in receipt of your communication of June 15th in which you ask to be advised on the following matters:

It appears from your communication that on the 29th day of May, 1912, your Board, after due and proper proceedings, awarded to Williams & Finnegan, a co-partnership, a contract for street work, the expense of which is to be assessed on private property. Notice of the award was posted and published, as required by the Charter, on June 1, 1912, and on June 5th, 1912, one E. J. Gallagher, filed with the Board of Public Works an affidavit in which said Gallagher claimed to be the agent of certain owners of property liable to be assessed for said street work and whose property formed the major part of the frontage of lots and lands on the street upon which the work was to be done and which are liable to be assessed for said street work. Gallagher at the same time presented to the Board of Public Works a contract

whereby said Gallagher, as agent for said owners agreed to do the whole of said work at the price at which the same had been awarded to Williams & Finnegan.

Acting upon the evidence presented by Gallagher's affidavit and his election as agent of said owners to do the work, the Board of Public Works, in pursuance of Sec. 19, Chap. I, Art. VI of the Charter, entered into a contract with said Gallagher as agent for said owners to do said work. Subsequently and on the 12th day of June, 1912, and after the contract had been executed as aforesaid, Williams & Finnegan, said copartnership, filed an affidavit with the Board of Public Works wherein it is claimed and asserted by said Williams & Finnegan that said persons for whom Gallagher claimed he was the agent, were not the owners of the major part of the frontage of lots and lands on the street upon which the work was to be done and which are liable to be assessed for said work.

Basing their demand upon that affidavit, Williams & Finnegan now demand of the Board of Public Works that the Board enter into the contract for the doing of said work with them.

Opinion.

Sec. 19, Chap. I, Art. VI of the Charter provides:

"In the case of improvement of streets, the owners of the major part of the frontage of lots and lands upon the street whereon the work is to be done, or which are liable to be assessed for such work, or, in the case of an assessment district, the owners of a major part of the superficial area embraced in such district, or their agents, shall not be required to present sealed proposals, but may, upon making oath that they are such owners, or the agents of such owners, within ten days after the first posting of notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. Should such owners not enter into a written contract therefor within said ten days, or should they enter

into such contract and fail to commence the work within the time stated therein, which time shall not be less than ten nor more than twenty days from the time of the execution of such contract, the Board shall enter into a contract with the original bidder to whom the contract was awarded at the price specified in his bid. If the original bidder shall fail or refuse for fifteen days after the first posting of notice of the award to enter into the contract, the Board shall again advertise for proposals as in the first instance."

It will be noticed that the section does not require any evidence to be presented to the Board of Public Works where the owners of a major part of the frontage of the lands to be assessed elect to enter into the contract, other than an affidavit filed by them or their agent declaring that they are the owners of the major frontage. It is not contended that Gallagher was not the agent of the owners claimed to be represented by him. The only claim is that those owners are not the owners of the major frontage. It is not the requirement of Section 19, nor could it be reasonable required, that when certain owners or their agents file an affidavit with the Board of Public Works that they are the owners of the major frontage, the Board should examine into their title as to the property. The Board of Public Works has not the facilities nor is it the proper forum for the determination of questions of title. Those questions often present intricate problems of law and fact which the courts find difficulty in solving and frequently leads to years of litigation.

Section 19 provides that the owners may enter into a contract "upon making oath that they are such owners." The affidavit is the only requirement necessary to their election and I am of the opinion that it was not necessary for the Board of Public Works to look further than the affidavit of Gallagher that he was the agent of certain owners whose property formed the major frontage. The Board in awarding the contract and accepting the affidavit of Gallagher exercised a judgment which is reposed in the Board and which, in the case of *Fairchild v. Wall*, 93 Cal. 401, is de-

clared by the Supreme Court of this State to be final. The facts of *Fairchild v. Wall* and facts presented in your communication are almost alike. The contract for street work had been awarded by the said city council of Oakland to the plaintiff. The charter of Oakland contained a provision substantially identical to Section 19 of Chapter I of Article VI of our Charter, the only difference being that the owners of three-fourths of the frontage of lots upon the street where the work was to be done had to elect to take over the contract awarded. Before the time had elapsed for that election an affidavit was filed by persons claiming to be owners of three-fourths of the frontage on the street and upon that affidavit the Superintendent of Streets executed the contract with those persons. The contractors to whom the contract had been awarded asserted that those persons did not, in numbers and amount of ownership, meet the requirements of the charter of Oakland. The Court, however, held that the action of the Superintendent in accepting the affidavit and entering into the contract with those persons claiming to be owners of three-fourths of the frontage on the street was final. The Court said:

“In the present instance we do not perceive that the street superintendent had any thing to do except to be satisfied that, as a fact, the owners, or their agents, of three-fourths of the frontage on the street where work was to be done elected to do the work ordered on the street on which they fronted. And the section of the statute which gives them this right, before the awardee has any right at all to do the work, has, as we have seen, this provision: ‘And who shall make oath that they are such owners or agents,’ who shall elect to do the work.

We can see no useful purpose for this clause, unless it be to enable the street superintendent to determine as a fact that the persons applying to elect to do the work are the persons who are entitled, under the law, to do it. It would appear that such a requirement is useless, unless it at least is intended to afford the means of ascertaining this fact. And

as an officer is presumed to do his duty, we do not see any sound reason why such a thing may not be confided to his discretion as a finality.

The street superintendent has nothing to do with the awardee of the contract, until the 'owners or agents' have failed to elect to do the work. All that he can do, in the first instance, is to enter into a contract with those whom the law gives the right to elect to do the street work, and before doing this he is to satisfy himself, from the affidavits required, that they are owners or agents, sufficient in number or amount to authorize them to do the work."

In view of the foregoing I advise you that, having entered into a contract with Gallagher as the agent of persons who are claimed by Gallagher in said affidavit to be the owners of the major part of the street whereon the work is to be done, your Board exercised a judgment lodged in your Board by Section 19 of Chapter I of Article VI of the Charter and that the action of entering into the contract with Gallagher as agent of those owners is final so far as Williams & Finnegan are concerned.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Voluntary Resignation From Fire Department—Action of Board Accepting.—No Power to Reinstat Two Years Afterwards.

June 21st, 1912.

Gentlemen: I am in receipt of your communication of the 14th inst. as follows:

"At the instance of Albert L. Saunders we submit his application for reinstatement in the Fire Department with the request that you advise us as to our power in the premises. The records of this Department show that on March 31, 1910,

he filed his resignation with this Department and the same was duly accepted on that date.”

You forward the following petition of Mr. Saunders addressed to your Board:

“I respectfully submit to your Honorable Board for approval the following application for reinstatement as member of the San Francisco Fire Department.

In March 1910, I was granted a leave of absence to attend a mining suit at Santa Rosa, Calif. Not knowing how long I would be, I asked for four days.

At the expiration of that time I asked for more time and was refused, it being too late in the morning to apply to the Chief Engineer, and having to take the 7:45 A. M. boat, I was compelled to go or be held for contempt of Court. Upon my return I was notified that charges of being absent without permission had been made against me, and being under the impression that I was to be dismissed from the Department, I resigned.

Enclosed please find affidavit of Chas. S. Harker for whom I was a witness.

I respectfully ask your Honorable Board to withhold action on this application until it has been referred to the City Attorney for an opinion.

Following is the affidavit subscribed and sworn to by Mr. Harker:

June 6th, 1912.

Charles S. Harker, being duly sworn deposes and says: That A. L. Saunders was subpoenaed, through my direction, in March 1910, in the case of the Western Carbonic Acid Co., and Geo. Madeira vs. the Sonoma Magnesite Co., and we had to hold him longer than we expected.

CHARLES S. HARKER.

Opinion.

It appears from these facts that Mr. Saunders resigned from the Fire Department voluntarily. He states that “be-

ing under the impression that I was to be dismissed from the Department I resigned." Of course this is not sufficient to show a resignation obtained under coercion, which is the only kind of resignation that can be treated by your commission as of no effect. Mr. Saunders would have had ample opportunity to explain to the Commission the points which he raises in his communication with reference to his having been under subpoena to attend court in Santa Rosa; also with reference to his having to take the early boat when he left San Francisco, as described in his communication. No member of the Department may fail to take advantage of an opportunity given him to defend himself against charges, and then resign, and claim that his resignation was obtained under coercion because he thought he would be dismissed. He must of course be given an opportunity to defend himself against any charges, but there is a corresponding duty upon him to avail himself of that opportunity. You are therefore advised that under the facts as submitted to me, there is no power in your Board to reinstate the petitioner.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

**Furnishing of House Numbers by Board of Works, Not a
Recognition of Streets or Approval of Map.**

July 1st, 1912.

Gentlemen: I am in receipt of your communication of the 25th inst., as follows:

"Application has been made to this Board by the Urban Realty Co., for the furnishing of house numbers of the lots within the Ingleside Terraces. Accompanying this application is a map of Ingleside Terraces. This Board has not ap-

proved said map, nor has the Board of Supervisors accepted any offer of dedication of streets shown on said map. Furthermore, this Board has not assumed any jurisdiction over the street work within the Ingleside Terraces.

It is, therefore, requested that you advise this Board as to whether or not it should proceed to furnish house numbers for the lots shown."

Opinion.

The furnishing of house numbers by the Board of Public Works has no connection with the matter of street work. It is a separate and distinct action, entirely disassociated with street work, and applies merely to the buildings. Furnishing numbers to the houses in the Ingleside Terraces would not, in any degree, be a recognition of the streets in said tract or an approval of the map thereof.

As a matter of convenience to the house-owners, and taking into consideration any possible future developments that may arise in the matter of approval of said map, in my opinion the Board of Public Works may proceed to furnish house numbers as requested.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

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